United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1902.

No. 1198.

153

ANNIE TERESA COVENEY, APPELLANT,

vs.

BENJAMIN F. CONLIN, PETER CONLIN, MARY J. CONLIN, GEORGIANA C. CONLIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 2, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1902.

No. 1198.

ANNIE TERESA COVENEY, APPELLANT,

vs.

BENJAMIN F. CONLIN, PETER CONLIN, MARY J. CONLIN, GEORGIANA C. CONLIN, FRANCES C. CONLIN, LUCRETIA A. TOOKER, MARY JANE WIARD, HARVEY L. MADDOX, WINNIFRED COOK, GEORGE S. COOK, VIRGINIA SEGGERMAN, VICTOR A. SEGGERMAN, CHARLOTTE L. C. LISIECKI, JOHN LISIECKI, FRANCIS LINDSY MADDOX, JOSEPH H. TOOKER, AND CHARLOTTE L. SULLIVAN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 12, 1902.

In the Court of Appeals of the District of Columbia.

ANNIE TERESA COVENEY, Appellant,
vs.
BENJAMIN F. CONLIN ET AL. } No. 1198.

---

a Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN, MARY JANE WIARD, MARY Ellen Maddox and Harvey L. Maddox, Her Husband; Winnifred Cook and George S. Cook, Her Husband; Virginia Seggerman and Victor A. Seggerman; Charlotte L. Conlin Lisiecki and John Lisiecki, Her Husband; Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Lucretia A. Tooker, Joseph H. Tooker, and Annie Teresa Coveney. } No. 16225. In Equity.

ANNIE TERESA COVENEY
vs.
BENJAMIN F. CONLIN ET AL. } Cross-bill.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Partition.*

Filed February 14, 1895.

In the Supreme Court of the District of Columbia, Sitting in Equity.

BENJAMIN F. CONLIN
vs.
PETER CONLIN, MARY JANE WIARD, MARY Ellen Maddox and Harvey L. Maddox, Her Husband; Winnifred Cook and George S. Cook, Her Husband; Virginia Seggerman and Victor A. Seggerman; Charlotte L. Conlin Lisiecki and John Lisiecki, Her Husband; Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Lucretia A. Tooker, and Annie Teresa Coveney.

Equity. No. 16225, Docket 38.

1. The plaintiff, Benjamin F. Conlin, is a citizen and resident of the city of Brooklyn, in the State of New York, and he brings this suit in his own right as one of the heirs-at-law and next of kin of William J. Florence, late of the city of New York, deceased. The family name of the said William J. Florence was Conlin and he was christened by the name of William J. Conlin, but he in after life adopted the name of Florence and transacted all his business and held title to the hereinafter-described real estate, situated in the city of Washington, D. C., in the name of William J. Florence. He was in his lifetime a resident of the city and State of New York.

2. The defendants are Peter Conlin, who was a brother of the said William J. Florence. He is of full age and is a citi-
2 zen of New York city, and he is sued as one of the heirs-at-law and next of kin of the said William J. Florence. The defendant Mary Jane Wiard, *née* Conlin, is at present residing in the city of Cambridge, Massachusetts. She is a sister of the said Florence and is of full age and is sued as one of the heirs-at-law and next of kin of the said Florence. The defendant Mary L. Maddox is the only heir-at-law of Edward B. Conlin, deceased, who was a brother of the said William J. Florence. She is of full age and resides with her husband, Harvey L. Maddox, in New York city. She is sued as one of the heirs-at-law of the said William J. Florence, and the defendant Harvey L. Maddox is joined as her husband. The defendants Winnifred Cook, wife of George S. Cook, and Virginia Saggerman, wife of Victor A. Seggerman, together with Charlotte L. Sullivan, wife of John C. Sullivan, of Washington, D. C., are the only children of Winnifred Tooker, deceased, who was a sister of the said William J. Florence. The said Winnifred Cook and Virginia Seggerman are both of full age and reside with their husbands in the city of New York, and are sued as heirs-at-law of the said William J. Florence. The said Charlotte L. Sullivan is not

sued because she sold and conveyed by deed of the — day of ——, 1895, all her right, title, and interest as an heir-at-law of the said William J. Florence to the defendant Lucretia A. Tooker, who is a resident of New York city and is sued as the grantee of the said Charlotte L. Sullivan, as one of the heirs-at-law of the said William J. Florence.

The defendants Charlotte Louise Conlin Lisiecki, wife of the defendant John Lisiecker, and the defendants Mary Jane Conlin, Georgiana Conlin, and Frances Cecelia Conlin are the only children of John Conlin, deceased, who was a brother of the said William J. Florence. They reside in —— and are all of full age and are sued as heirs-at-law of the said William J. Florence.

3

The defendant Teresa Coveney was the widow of the said William J. Florence, but since his death has intermarried with Coveney. Her residence is in New York city. She is sued as the widow of the said William J. Florence.

3. The said William J. Florence died on the 19th day of November, 1901, seized in fee of the following-described real estate situate, lying, and being in the city of Washington, District of Columbia, to wit: Lots numbered as (23) twenty-three and (24) twenty-four, in John B. Alley's and Harvey Page's recorded subdivision of lots in square numbered (92) ninety-two, according to the official records of the city of Washington.

4. As to said real estate the said William J. Florence died intestate, leaving the defendant Annie Teresa Coveney, his widow, who is entitled to dower therein, and Peter Conlin, Mary Jane Wiard, Mary L. Maddox, Winnifred Cook, Virginia Seggerman, Charlotte L. Sullivan, Charlotte Louise Conlin Lisiecki, Mary Jane Conlin, Georgiana Conlin, and Frances Cecelia Conlin, his heirs-at-law, to whom, with the complainant, the said described real estate, subject to the dower right of the said widow, descended as tenants in common. The said Charlotte L. Sullivan having conveyed her interest to the defendant Lucretia A. Tooker, she is now entitled to the interest inherited by the — Charlotte L. Sullivan.

5. The parties hereto, subject to the dower right of the said Annie Teresa Coveney, are entitled to the following proportions, viz: The complainant, Benjamin F. Conlin, Peter Conlin, and Mary Jane Wiard are each entitled to one-sixth part. The defendant Mary Ellen Maddox is entitled to one-sixth part. The defendants Winnifred Cook, Virginia Seggerman, and Lucretia A. Tooker are each entitled to one-third of one-sixth part, and the defendants Charlotte Louise Conlin Lisiecki, Mary Jane Conlin, Georgiana Conlin, and Frances Cecelia Conlin are each entitled to one-fourth of one-sixth part. The said William J. Florence left no children or descendants.

4

Prayer.

Your petitioner therefore prays that Peter Conlin, Mary Jane Wiard, Mary Ellen Maddox and her husband, Harvey L. Maddox; Winnifred Cook and her husband, George S. Cook; Virginia Segger-

man and Victor A. Seggerman; Charlotte L. Conlin Lisiecki and John Lisiecki, her husband; Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Lucretia A. Tooker, and Annie Teresa Coveney may be made parties defendant to this petition; that the United States writ of subpœna issue to each of them, commanding them to appear and answer to the exigencies of this petition; that partition of the hereinbefore-described premises may be made to each of the parties entitled, so that they may each hold his and her respective share in severalty, or if, in the opinion of the court, the said premises cannot be specifically divided so as to set off to each party entitled his or her share in severalty without manifest injury to them, that for the purpose of partition the dower of the said Annie Teresa Coveney may be assigned to her in such manner and form as the
5 court may determine, and that the said real estate may be sold and the proceeds divided between and among the parties hereto as the court may find them to be entitled, and for such other and further relief as may be necessary.

S. S. HENKLE &
JOHN F. ENNIS,
Solicitors for Petitioners.

Answer of Defendant.

Filed February 3, 1896.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

BENJAMIN F. CONLIN *against* PETER CONLIN ET AL. } In Equity. No. 16225, Doc. 38.

The answer of Annie Teresa Coveney, one of the defendants in the bill of complaint of Benjamin F. Conlin, exhibited against her in the above-entitled cause.

To the supreme court of the District of Columbia, holding an equity court for said District:

This defendant, Anna Teresa Coveney, now and at all times hereby reserving unto herself all benefits of exceptions and advantages that may be had or taken to the many errors and imperfections in said bill contained, for answer says as follows:

6 1. In answer to the first and second paragraphs of said bill, she admits the same, save and except she says she is advised and believes, and so believing denies, that said Charlotte L. Sullivan had any estate or interest in said real estate, either as heir-at-law of said William J. Florence or otherwise, which she could sell and convey as alleged, and if the same be material this defendant calls for strict proof thereof.

2. In answer to the third paragraph, she admits that said William

J. Florence died on the said 19th day of November, A. D. 1891, seized and possessed of the said described real estate mentioned in said bill.

3. In answer to the fourth paragraph, she is advised and believes, and being so advised and believing she denies, that said William J. Florence died intestate as to the said real estate; and, further, she denies that the said real estate descended to the persons named in said paragraph, subject to the dower right of this defendant therein; and, further, she denies that the said named persons (except herself) took or have any estate or interest in said real estate; and, further, she denies she took only a dower interest in said real estate; but this defendant, further answering, says that the said William J. Florence duly made and executed according to law his last will and testament bearing date on the 5th day of May, A. D. 1876, wherein and whereby he ordered and directed the payment of his debts and funeral expenses to be paid by this defendant as his executrix; and, further, by his said will gave, devised, and bequeathed unto this defendant all his estate, real and personal, and such property as he should die seized and possessed, wheresoever and whatsoever,
7 to have and to hold to this defendant, her heirs, executors, administrators, and assigns, according to the nature and quality of the estate, forever, and also in and by said will he nominated and appointed this defendant as executrix of his said will, as will appear by a certified copy of said will and testament herewith filed, marked Exhibit A. T. C. No. 1, which is made a part of this answer, which this defendant prays leave to read and refer to.

4. In further answer, this defendant says that said will and testament of said William J. Florence was duly proved as the last will and testament of said William J. Florence of all his real and personal estate, and was admitted to record in the surrogate's court held in and for the county of New York, in the city of New York, in the State of New York, all of which will more fully appear by an exemplified transcript of record of the proceedings had in said surrogate's court in the matter of said will and testament, herewith filed and marked as Exhibit A. T. C. No. 1, referred to in said paragraph 111 of this answer.

5. In further answer, this defendant says that afterwards, on the 2d day of June, A. D. 1892, under and by virtue of the act of Congress approved on the 9th day of June, 1888 (25th U. S. Statutes at Large, page 246), a certified copy of said will and testament of said William J. Florence was duly filed in your honorable court, holding a special term of said court for orphans' court business, and the same was duly recorded in Will Book No. 31, folio 460, of the register of wills' office of the District of Columbia, as will fully appear by reference to said certified copy and record thereof in said register of wills' office.

8 6. In answer to the fifth paragraph of said bill, this defendant says she is advised and believes, and so believing claims, that said complainant and the persons named or either of them are or is not entitled to the said real estate in said bill of complaint

mentioned, or any part or portion thereof or any interest therein, as heirs-at-law of said William J. Florence, deceased, or otherwise, as alleged; and, further answering, this defendant says that said William J. Florence left no children or descendants of such.

7. In further answer to said bill, this defendant avers that she and the said William J. Florence were citizens and residents of the State of New York, and domiciled in the city of New York, in State of New York, for over twenty years prior to the death of said William J. Florence, her husband, in November, 1891.

That by the laws of the State of New York during the whole of said period all property, real and personal, whenever acquired after the making of a will and before the death of a testator, passed by his *will* under words devising the whole of the testator's estate, unless the testator in his will expressly provide otherwise.

That the said William J. Florence never had any domicile in the District of Columbia; that when said will was made the said William J. Florence intended to and by the express language contained in said will and testament did include all estate, real and personal, which he then had and which he might afterwards acquire, *wheresoever* the same might be situated; and, further, the said will of said William J. Florence, deceased, having been made by him at *his*
place of his domicile in the said State of New York, where,
9 by the express provision of law, he had the right to devise
after-acquired property, the same is to be construed and interpreted under the laws of the said State of New York, and, thus being interpreted, vests the real estate described in said bill of complaint in this defendant to the exclusion of all the persons named in the said bill of complaint as the heirs-at-law or grantees of any one alleged to be an heir-at-law.

8. This defendant, further answering, avers that she and the said William J. Florence were citizens and residents of the State of New York and domiciled therein for twenty years prior to the death of the said William J. Florence in the year 1891; and, further, that by the laws of the said State, property of which any testator died seized and possessed passed under his will containing words of general gift or devise without regard to the date of the will or the time when he became seized of the real estate; and, further, this defendant avers that the said William J. Florence and this defendant having neither children or descendants and having accumulated property, both real and personal, by their joint efforts, and with the said statute of New York as to the scope of a *will* as all one's estate, mutually agreed to and with each other that each should devise and bequeath to the other, their heirs, executors, administrators, and assigns, all estate, both real and personal, which they then had, as well as such other property, whether real or personal, as each should thereafter acquire, die seized and possessed of; and, further, that in pursuance of the said
contract or agreement the said William J. Florence did make
10 and execute the aforesaid will and testament in favor of this
defendant, and this defendant did make and execute her will and testament in favor of said William J. Florence in like form,

manner, and words as is contained in the aforesaid will and testament of said William J. Florence, a true copy of which is herewith filed, marked Exhibit A. T. C. No. 2, which she prays leave to read and refer to, being ready and willing, if need be, to produce the original thereof at the hearing.

9. This defendant in further answer avers the fact to be true that after making of the aforesaid wills and the acquiring of the real estate described in the said bill of complaint the said William J. Florence again and again reiterated to this defendant his understanding of the said agreement under which the aforesaid wills were made and declared it to be his understanding that his said will then executed, and after his death admitted to probate and record in the State of New York and in the District of Columbia, included said real estate described in the said bill of complaint, and that on his death it would vest in this defendant, his heirs and assigns; and, further, this defendant says that the said William J. Florence made said agreement in good faith and fully believed that he had made a valid will pursuant to his said agreement with this defendant, and that it included and would include all property, both real and personal, whenever the same was acquired and wheresoever situated; and, further, as showing his true intention and the agreements and his belief that he had done so, and in order that this defendant might know what property would come to this defendant upon his death, the said William J. Florence, in the summer of the year 1891, shortly before his death, gave to this defendant a list of the securities and assets of his estate, including, among other
11 things, "Lot on corner of Connecticut avenue bounded by 21st street in the city of Washington," and which this defendant avers to be the same premises described in the bill of complaint in this cause, a copy of which is hereto annexed as part of this answer, marked Exhibit A. C. T. No. 3, the original of which she will produce at the hearing hereof.

This defendant, believing she has answered said bill of complaint, prays she may be dismissed with her reasonable costs and said bill of complaint be dismissed.

ANNIE T. COVENEY.

WILLIAM J. MILLER,
Solicitor for Defendant.

STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Annie T. Coveney, being first duly sworn, do solemnly swear that I am the defendant named in the above-entitled cause, and that I have read the foregoing answer by me subscribed, and I know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those facts therein stated upon information and belief I believe the same to be true.

ANNIE T. COVENEY.

Subscribed and sworn to before me this 31st day of January, A. D. 1896, by Anna T. Coveney.

D. E. SEYBEL,
[SEAL.] *Notary Public, N. Y. Co.*

12 STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that D. E. Seybel, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of the said court and county the 31 day of January, 1896.

HENRY D. PURROY, *Clerk.*

13 EXHIBIT A. C. T. No. 1.

The people of the State of New York, by the grace of God, free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the surrogate of the city and county of New York, do find there remaining a certain record—the following record, to wit, the petition, citation, proofs of service, advertisement, notice of appearance, and answer of contestants, in the matter of the estate of William J. Florence, deceased, in the words and figures following, to wit:

14 Surrogate's Court, City and County of New York.

In the Matter of Proving the Last Will and Testament of WILLIAM J. FLORENCE, Deceased, as a Will of Real and Personal Property.

To the surrogate's court of the city and county of New York:

The petition of Annie Teresa Florence, residing at No. 142 W. 72 street, in the city of New York, respectfully showeth that your petitioner is the executrix named in the
J. F. McL., clerk. last will and testament of William J. Florence, late of the county of New York, deceased.

That said last will and testament, herewith presented, relates to both real and personal property, and bears date the fifth day of May, 1876, and is signed at the end thereof by the said testator and by Richard H. Bowne, Geo. W. Zener, Wm. H. Dakin, and A. P. Schultz as subscribing witnesses.

That petitioner does not know of any codicil to said last will and testament, nor is there any codicil to the best of her information and belief.

That the said deceased was, at or immediately previous to his death, a resident of the county of New York, and departed this life in Philadelphia, Pa., on the nineteenth day of November, 1891.

Your petitioner further states that the widow and all the heirs, all the next of kin of said deceased testator, all persons in being who would take an interest in any portion of such real and personal property under the provisions of said will or otherwise, and the executor or executors, trustee or trustees named or described therein, together with their residences, are as follows, to wit:

Your petitioner, who is the widow of deceased; Edward B. Conlin, a brother of deceased, who resides at 170 East 160th street, New York city; John Conlin, a brother of deceased, who resides at 377 West 32 street, New York city; Peter Conlin, a brother of deceased, who resides at 127 West 120th street, New York city; Benjamin Conlin, a brother of deceased, who resides at South Brooklyn, New York, and whose address is station V, post-office, Brooklyn, N. Y.; Mary Jane Conlin Wiard, a sister of deceased, who resides at 1012 13th street, Washington, D. C.; Joseph H. Tooker, Jr., a nephew of deceased, who resides at 133 E. 116th St., N. Y. city; Daisy Tooker Sullivan, a niece of deceased, who resides at San Francisco, California; Winnifred Tooker Cooke, a niece of deceased, who resides at 133 East 116th St., N. Y. city; Mary Jane Seggermann, a niece of deceased, who resides at 133 East 116th St., N. Y. city.

* * * * * * *

That said decedent left him surviving no child or children, adopted child or children, the issue of any deceased child or children, or the issue of any deceased adopted child or children, or any father or mother, or any deceased child's husband or wife, or brother or sister of the half or the whole blood, or the issue of any deceased brother or sister, or any deceased brother's wife, or any deceased sister's husband, except as above stated.

That personal service of a citation cannot with due diligence be made upon the above-named non-residents within the State of New York, and your petitioner prays for an order directing the service thereof without the State or by publication pursuant to sections 2522 and 2523 of the Code of Civil Procedure.

That no petition for the probate of said will or for letters of administration on said estate has been heretofore filed in this or any other surrogate's court of this State.

Your petitioner further prays that a citation issue to the above-named persons to attend the probate thereof, and that the said last will and testament may be proved as a will of real and personal property, and that letters testamentary may be issued thereon to the executrix who may qualify thereunder.

Dated New York city, December 12, 1891.

ANNIE TERESA FLORENCE, *Petitioner.*

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Annie Teresa Florence, the petitioner named in the foregoing petition, being duly sworn, deposes and says that she has read the foregoing petition subscribed by her and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

ANNIE TERESA FLORENCE, *Petitioner.*

Sworn to this 14th day of December, A. D. 1891.

GEO. T. MORTIMER,
Comm'r of Deeds, N. Y. County.

17 Endorsed.

Will filed 15 day of Dec., 1891.
Pet. filed 15 day of Dec., 1891.
Cit. returnable 19 day of Feb'y, 1891.
Sup. cit. returnable — day of ——, 189–.
Sup. pet. filed — day of ——, 189–.

Surrogate's Court, City and County of New York.

In the Matter of Proving the Last Will and Testament of WILLIAM J. FLORENCE, Deceased, as a Will of Real and Personal Property.

Petition.

Fettretch, Silkman & Seybel, Esq., attorneys for petitioner, No. — Times bldg., New York city.

Admitted 5 Ap'l, 1892, as to real and personal estate.
Decrees: On decree.
Letters testamentary: Liber 85, page 130.

18 *Memorandum for Probate Clerk.*

Proponents will please fill the following blanks before filing:
What is the value of the personal property? No.
Is the value of the whole estate less than $500?
Are any of the subscribing witnesses dead? If so, give their names.
Names and residences of subscribing witnesses you propose to call on the return day of citation. All of them.
Name- of executors who will qualify, with their residences, giving street and number. Executrix, 142 W. 72 St., N. Y. city.
Where was the will executed? N. Y. city.
Will a commission be necessary? No.
Where did the deceased reside at the time of death? N. Y. city.

19 The people of the State of New York, by the grace of God free and independent, to Annie Teresa Florence (petitioner), Edward B. Conlin, John Conlin, Peter Conlin, Benjamin Conlin, Mary Jane Conlin Wyard, Joseph H. Tooker, Jr., Daisy Tooker Sullivan, Winnifred Tooker Cooke, and Mary Jane Seggermann, the widow and heirs and next of kin of William J. Florence, deceased, send greeting:

Whereas Annie Teresa Florence, of the city of New York, has lately applied to the surrogate's court of our city and county of New York to have a certain instrument in writing, bearing date the fifth day of May, 1876, relating to both real and personal property, duly proved as the last will and testament of William J. Florence, late of the city and county of New York, deceased, therefore you and each of you are cited to appear before the surrogate of our city and county of New York, at his office in the city of New York, on the 19th day of February, one thousand eight hundred and ninety-two, at ten o'clock in the forenoon of that day, then and there to attend the probate of the said last will and testament.

20 And such of you as are hereby cited as are under the age of twenty-one years are required to appear by your guardian, if you have one, or, if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the surrogate to represent and act for you in the proceeding.

In testimony whereof we have caused the seal of the surrogate's court of the said city and county of New York to be hereunto affixed.

Witness Hon. Rastus S. Ransom, surrogate of our said city and county, at the city of New York, the 19th day of [SEAL.] December, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES F. McLAUGHLIN,
Clerk of the Surrogate Court.

FETTRETCH, SILKMAN & SEYBEL,
Attorneys for Petitioner, Times Bldg., N. Y. City.

21 NOTE.—Outside of New York county the county clerk's certificate must be attached to the notary's jurat. The original citation must be returned to the probate clerk before one o'clock p. m. on the day preceding the return day, with sworn proof of service or admission of service duly acknowledged.

Surrogate's Court, City and County of New York.

In the Matter of Proving the Last Will and Testament of WILLIAM J. FLORENCE, Deceased, as a Will of Real and Personal Property.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Dunnelle Van Schaick, of the city of New York, being duly sworn, says that he is over the age of twenty-one years; that he

made personal service of the within citation in the above-entitled special proceeding on the persons named below, whom deponent knew to be the persons mentioned and described in said citation, by delivering to and leaving with each of them personally a true copy of said citation, as follows: On the twenty-ninth day of December, 1891, at No. 170 East 116th street, on Edward B. Conlin; on the seventh day of January, 1892, at No. 377 West 32nd street, on John Conlin; on the twenty-eighth day of December, 1891, at No. 127 West 120th street, on Peter Conlin; and also on the twenty-eighth day of December, 1891, at No. 133 East 116th street, on Winnifred Tooker Cooke; and also on the twenty-eighth day of December, 1891, at No. 1 West 115th street, on Mary Jane Seggerman; and on the twenty-third day of December, 1891, at No. 38 Versey street, on Joseph H. Tooker, Jr., and all the above in the city of New York; and on the
22 second day of January, 1892, at No. 396 Eleventh street, city of Brooklyn, county of Kings, on Benjamin Conlin; deponent also on the twenty-second day of December, 1891 (and before the day of the first publication of the citation herein), deposited in the post-office at the city of New York a copy of the within citation and a copy of the order for publication in the above-entitled special proceeding, contained in a securely closed postpaid wrapper, directed to each of the following persons respectively at the places designated below, viz:

To Mary Jane Conlin Wyard, at No. 1012 13th street, Washington, D. C., and Daisy Tooker Sullivan, at San Francisco, California.

DUNNELLE VAN SCHAICK.

Sworn to before me this 8th day of January, 1892.

JOHN MACKIN,
Comm'r of Deeds, City N. Y.

23 STATE OF NEW YORK, }
City and County of New York, } *ss:*

David S. Owen, being duly sworn, says that he is the principal clerk of the publisher of the New York Law Journal, a daily newspaper printed and published in the city of New York; that the advertisement hereto annexed has been regularly published in the said The New York Law Journal once a week for six weeks successively, commencing on the 23rd day of December, 1891.

DAVID S. OWEN.

Sworn to before me this 16th day of February, 1892.

JOHN J. COSGROVE,
Notary Public (197), *New York Co.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Joseph T. Scheiffelin, being duly sworn, says that he is the principal clerk to the publisher of the Weekly Union, a newspaper printed and published in the city of New York; that the advertise-

ment hereto annexed has been regularly published in the said The Weekly Union once each week for six weeks successively, commencing on the 23rd day of December, 1891.

JOSEPH T. SCHIEFFELIN.

Sworn to before me this 17th day of February, 1892.

MOSES HERMAN,
Com'r of Deeds, New York County.

J. F. McL., clerk.

24 FLORENCE, WILLIAM J.—The people of the State of New York, by the grace of God free and independent, to Annie Teresa Florence (petitioner), Edward B. Conlin, John Conlin, Peter Conlin, Benjamin Conlin, Mary Jane Conlin Wyard, Joseph H. Tooker, Jr., Daisy Tooker Sullivan, Winifred Tooker Cooke, and Mary Jane Seggermann, the widow, heirs, and next of kin of William J. Florence, deceased, send greeting:

Whereas Annie Teresa Florence, of the city of New York, has lately applied to the surrogate court of our city and county of New York to have a certain instrument in writing, bearing date the fifth day of May, 1876, relating to both real and personal property, duly proved as the last will and testament of William J. Florence, late of the city and county of New York, deceased; therefore you and each of you are cited to appear before the surrogate of our city and county of New York, at his office, in the city of New York, on the 19th day of February, one thousand eight hundred and ninety-two, at ten o'clock in the forenoon of that day, then and there to attend the probate of the said last will and testament.

And such of you as are hereby cited as are under the age of twenty-one years are required to appear by your guardian, if you have one, or, if you have none, to appear and apply for one
25 to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the surrogate to represent and act for you in the proceeding.

In testimony whereof we have caused the seal of the surrogate's court of our said city and county of New York to be here-
[SEAL.] unto affixed. Witness Hon. Rastus S. Ransom, surrogate of our said city and county, at the city of New York, the 19th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES F. McLAUGHLIN,
Clerk of the Surrogate's Court.

W.

FETTRETCH, SILKMAN & SEYBEL,
Attorneys for Petitioner, Times Building, N. Y. City.

NOTE.—The advertisement which was published in the Weekly Union is the same as that which appeared in the New York Law Journal under date of December 23rd, 1891.

made personal service of the within citation in the above-entitled special proceeding on the persons named below, whom deponent knew to be the persons mentioned and described in said citation, by delivering to and leaving with each of them personally a true copy of said citation, as follows: On the twenty-ninth day of December, 1891, at No. 170 East 116th street, on Edward B. Conlin; on the seventh day of January, 1892, at No. 377 West 32nd street, on John Conlin; on the twenty-eighth day of December, 1891, at No. 127 West 120th street, on Peter Conlin; and also on the twenty-eighth day of December, 1891, at No. 133 East 116th street, on Winnifred Tooker Cooke; and also on the twenty-eighth day of December, 1891, at No. 1 West 115th street, on Mary Jane Seggerman; and on the twenty-third day of December, 1891, at No. 38 Versey street, on Joseph H. Tooker, Jr., and all the above in the city of New York; and on the
22 second day of January, 1892, at No. 396 Eleventh street, city of Brooklyn, county of Kings, on Benjamin Conlin; deponent also on the twenty-second day of December, 1891 (and before the day of the first publication of the citation herein), deposited in the post-office at the city of New York a copy of the within citation and a copy of the order for publication in the above-entitled special proceeding, contained in a securely closed postpaid wrapper, directed to each of the following persons respectively at the places designated below, viz:

To Mary Jane Conlin Wyard, at No. 1012 13th street, Washington, D. C., and Daisy Tooker Sullivan, at San Francisco, California.

DUNNELLE VAN SCHAICK.

Sworn to before me this 8th day of January, 1892.

JOHN MACKIN,
Comm'r of Deeds, City N. Y.

23 STATE OF NEW YORK, }
City and County of New York, } *ss:*

David S. Owen, being duly sworn, says that he is the principal clerk of the publisher of the New York Law Journal, a daily newspaper printed and published in the city of New York; that the advertisement hereto annexed has been regularly published in the said The New York Law Journal once a week for six weeks successively, commencing on the 23rd day of December, 1891.

DAVID S. OWEN.

Sworn to before me this 16th day of February, 1892.

JOHN J. COSGROVE,
Notary Public (197), *New York Co.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Joseph T. Scheiffelin, being duly sworn, says that he is the principal clerk to the publisher of the Weekly Union, a newspaper printed and published in the city of New York; that the advertise-

ment hereto annexed has been regularly published in the said The Weekly Union once each week for six weeks successively, commencing on the 23rd day of December, 1891.

JOSEPH T. SCHIEFFELIN.

Sworn to before me this 17th day of February, 1892.

MOSES HERMAN,
Com'r of Deeds, New York County.

J. F. McL., clerk.

24 FLORENCE, WILLIAM J.—The people of the State of New York, by the grace of God free and independent, to Annie Teresa Florence (petitioner), Edward B. Conlin, John Conlin, Peter Conlin, Benjamin Conlin, Mary Jane Conlin Wyard, Joseph H. Tooker, Jr., Daisy Tooker Sullivan, Winifred Tooker Cooke, and Mary Jane Seggermann, the widow, heirs, and next of kin of William J. Florence, deceased, send greeting:

Whereas Annie Teresa Florence, of the city of New York, has lately applied to the surrogate court of our city and county of New York to have a certain instrument in writing, bearing date the fifth day of May, 1876, relating to both real and personal property, duly proved as the last will and testament of William J. Florence, late of the city and county of New York, deceased; therefore you and each of you are cited to appear before the surrogate of our city and county of New York, at his office, in the city of New York, on the 19th day of February, one thousand eight hundred and ninety-two, at ten o'clock in the forenoon of that day, then and there to attend the probate of the said last will and testament.

And such of you as are hereby cited as are under the age of twenty-one years are required to appear by your guardian, if you have one, or, if you have none, to appear and apply for one
25 to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the surrogate to represent and act for you in the proceeding.

In testimony whereof we have caused the seal of the surrogate's court of our said city and county of New York to be here-
[SEAL.] unto affixed. Witness Hon. Rastus S. Ransom, surrogate of our said city and county, at the city of New York, the 19th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES F. McLAUGHLIN,
Clerk of the Surrogate's Court.

W.

FETTRETCH, SILKMAN & SEYBEL,
Attorneys for Petitioner, Times Building, N. Y. City.

NOTE.—The advertisement which was published in the Weekly Union is the same as that which appeared in the New York Law Journal under date of December 23rd, 1891.

26 Surrogate's Court, City and County of New York.

In the Matter of the Probate of the Alleged Will of WILLIAM J. FLORENCE, Dec'd.

Please take notice that I am retained by and hereby appear for Edward B. Conlin, a next of kin of the decedent above named, and hereby demand service upon me of all papers herein at my office, No. 128 Broadway, New York city. Dated New York, February 19th, 1892.

AUGUST REYMERT,
Attorney for Contestant, Edward B. Conlin,
128 *Broadway, N. Y.*

J. F. McL., clerk.

Endorsed: Filed Feb'y 19, '92.

27 I, William J. Florence of the city of New York, do make publish and declare this my last will and testament in manner and form following, that is to say:

First. I order and direct that all my just debts and funeral expenses be paid by my executrix hereinafter named so soon after my decease as the same can conveniently be done.

Second. I give devise and bequeath unto my beloved wife Anna Teresa Florence all my estate real and personal and such as I shall die seized and possessed of wheresoever and whatsoever. To have and to hold to her her heirs executors administrators and assigns according to the nature and quality of the estate forever.

And I do nominate and appoint my said wife executrix of this my last will and testament.

In testimony whereof I have hereunto set my hand and seal this fifth day of May one thousand eight hundred and seventy six.

WM. J. FLORENCE. [L. S.]
W. J. FLORENCE. [L. S.]

Signed, sealed, published, and declared by the above-named testator as and for his last will and testament in the presence of us, who at his request, in his presence and in the presence of each other, have hereunto subscribed their names as witnesses.

J. F. McL., clerk.

RICH'D H. BOWNE,
177 2*nd Ave.*
GEO. W. ZENER,
194 *Devoe St., Bklyn.*
WM. H. DAKIN,
241 *Ryerson St., Brooklyn, New York, N. Y.*
A. P. SCHULTZ,
333 *East* 118*th St., N. Y. City.*

28 Surrogate's Court of the City & County of New York.

In the Matter of the Probate of the Alleged Will of WILLIAM J. FLORENCE, Deceased.

The undersigned, Edward B. Conlin, one of the next of kin of the decedent, hereby contests the validity of the dispositions of the real and personal estate of the said decedent, of which he died seized and possessed, contained in a certain paper-writing bearing date the 5th day of May, 1876, and purporting to be his last will and testament, presented to and now before this court for probate as a will of real and personal estate; and for answer to the petition of Annie Teresa Florence for the probate of said will, he avers upon information and belief as follows, to wit:

1. That the said paper is not the last will of said decedent.

2. That the said paper was not subscribed, published, and attested as and for his last will in conformity with the statute in such case made and provided.

3. That the paper propounded for probate herein is invalid as a last will and testament, and is illegal and void.

Wherefore the above-named Edward B. Conlin, contestant, prays that the proceedings may be dismissed with costs.

E. B. CONLIN.

AUGUST REYMERT,
Att'y for Contestant, 128 *Broadway, N. Y. City.*

29 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Edward B. Conlin, being duly sworn, says he is one of the next of kin of William J. Florence, deceased, *as* has been served with citation herein to appear upon the probate of an alleged will of said William J. Florence; that he has read the foregoing answer and objections, and knows the contents thereof; that the same are true, except as to such matters as are therein stated to be alleged upon information & belief, and as to such matters he believes it to be true.

E. B. CONLIN.

Sworn to before me this 18th day of February, 1892.

H. W. LEONARD,
Notary Public, N. Y. Co.

Filed Feb'y 18, 1892.

30 At a surrogate's court held in and for the county of New York, at the county court-house, in the city of New York, on the 5th day of April, in the year one thousand eight hundred and ninety-two.

Present: Hon. Rastus S. Ransom, surrogate.

In the Matter of the Probate of a Paper Propounded as the Last Will and Testament of WILLIAM J. FLORENCE, Deceased.

Satisfactory proof having been made of the due service of the citation heretofore issued in this matter requiring the proper parties to be and appear before the surrogate's court of the county of New York on the nineteenth day of February, 1892, to attend the probate of the last will and testament of William J. Florence, late of the city and county of New York, deceased, bearing date the fifth day of May, 1876, and Anna Teresa Florence, the executrix named in said instrument, the petitioner herein, having appeared in person and by Fettretch, Silkman & Seybel, her attorneys, in support of the proof of the same, and Edward B. Conlin, one of the next of kin of said deceased, having appeared in person and by August Reymert, his attorney, and filed an answer in opposition thereto, and the court having by an order entered the twenty-third day of February, 1892, directed that the testimony be taken by Edward F. Under-
31 hill as assistant, he to report the same to the court for its consideration, and under said order witnesses having been examined and proofs taken touching the facts and circumstances attending the execution thereof, and the competency of the said William J. Florence to execute the same as and for his last will and testament, and the assistant having submitted to the court the record of proofs and allegations, and the court having read the said record, and mature deliberations being had thereon, now, on motion of Joseph Fettretch, of counsel for the proponent, it is adjudged that the said instrument in writing purporting to be the last will and testament of the said William J. Florence, deceased, was properly executed and is genuine and valid; that the said William J. Florence at the time of the execution of the said instrument was in all respects competent to execute the same and was not under restraint or undue influence, and that the said instrument be, and the same hereby is, admitted to probate and established as a will of real and personal estate, and that the same be recorded, and that letters testamentary be issued to the executrix in said will named on her taking the oath required by statute.

RASTUS S. RANSOM, *Surrogate.*

J. F. McL., clerk.

32 Surrogate's Court, City and County of New York.

In the Matter of Proving the Last Will and Testament of WILLIAM J. FLORENCE, Deceased.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

I, Annie T. Florence, executrix named in the last will and testament of William J. Florence, late of the city of New York, deceased, do depose and say that I — a resident of Hotel San Remo, 75th St. & 8th avenue, city, county, and State of New York; that I am over twenty-one years of age, and that I will well, faithfully, and honestly discharge the duties of executrix of said last will and testament.

ANNIE T. FLORENCE.

Sworn to this 5th day of April, A. D. 1892.

CHAUNCEY B. STONE,
[SEAL.] *Notary Public, New York County.*

33 The people of the State of New York, by the grace of God free and independent to all to whom these presents shall come or whom they may concern, send greeting:

Know ye that at the city and county of New York, on the fifth day of April, in the year of our Lord one thousand eight hundred and ninety-two, before Hon. Rastus S. Ransom, surrogate of our said city and county, the last will and testament of William J. Florence, deceased, was proved and is now approved and allowed by us; and the said deceased having been at the time of his death a resident of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels, and credits of the said testator, and also the auditing, allowing, and final discharging the account thereof doth belong unto us, the administration of all and singular the goods, chattels, and credits of the said deceased, and any way concerning his will, is granted unto Annie T. Florence, of the city of New York, executrix in the said will named, she being first duly sworn well, faithfully, and honestly to discharge the duties of such executrix.

In testimony whereof we have caused the seal of office of the surrogate's court of the city and county of New York to be hereunto affixed.

34 Witness Hon. Rastus S. Ransom, surrogate of our said
[SEAL.] city and county, at the city of New York, the 6th day of April, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the one hundred and sixteenth.

JAMES F. McLAUGHLIN,
Clerk of the Surrogate's Court.

* * * * * * *

All which we have caused by these presents to be exemplified, and the seal of our said surrogate's court to be hereunto affixed.

Witness Hon. Frank T. Fitzgerald, a surrogate of the city and county of New York, at the city of New York, the twelfth day of December, in the year of our Lord one thousand eight hundred and ninety-five, of our Independence the one hundred and twentieth.

[SEAL.] J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

I, Frank T. Fitzgerald, a surrogate of said city and county and presiding magistrate of the surrogate's court, do hereby certify that J. Fairfax McLaughlin, whose name is subscribed to the preceding exemplification, is the clerk of said surrogate's court of the city and county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the ex-
35 emplification is the seal of our said surrogate's court, and

that the attestation thereof is in due form and according to the form of attestation used in this State.

Dated New York, December 12th, 1895.

FRANK T. FITZGERALD, *Surrogate.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, J. Fairfax McLaughlin, clerk of the surrogate's court of the city and county of New York, do hereby certify that Hon. Frank T. Fitzgerald, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogate's court of the city and county of New York, duly elected, sworn, and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 12th day of December, 1895.

[SEAL.] J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

36 EXHIBIT A. C. T. No. 2.

Filed February 3, 1896.

I, Anna Teresa Florence, of the city of New York, wife of William J. Florence, do make, publish and declare this my last will and testament in manner following, that is to say:

First. I order and direct that all my just debts and funeral expenses be paid by my executor hereinafter named so soon after my decease as the same can conveniently be done.

Second. I give, devise and bequeath unto my husband, William J. Florence, all my estate, real and personal, and such as I shall die seized and possessed of, wheresoever and whatsoever, to have and to hold to him, his heirs, executors, administrators and assigns, according to the nature and quality of the estate, forever.

And I do nominate and appoint my said husband executor of this my last will and testament.

In testimony whereof I have hereunto set my hand and seal this fifth day of May, one thousand eight hundred and seventy-six.

ANNIE TERESA FLORENCE. [SEAL.]
ANNIE TERESA FLORENCE. [SEAL.]

Signed, sealed, published, and declared by the above-named testatrix as and for her last will and testament, in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

RICH'D H. BOWNE,
177 *2nd Ave.*
GEO. W. ZENER,
194 *Devoe St., Bklyn.*
WM. H. DAKIN,
241 *Ryerson St., Brooklyn, N. Y.*
A. P. SCHULTZ,
333 *East 118th St., N. Y. City.*

37 EXHIBIT A. C. T. No. 3.

Filed February 3, 1896.

1891.

List of Securities and Assets in Account of W. J. Florence.

SATURDAY, *May 23rd*, 1891.

Owned by Mrs. Florence, lot in Brooklyn, 16th street.
" " " " and house, 62 Park Ave., N. Y.
164 shares of Eagle Fire Co. stock, $40 per share, par value 6,560. Interest due April and October.
3 bonds 6% Metropolitan Gas Co., $500.00 each, $1,500. Interest payable February & August.
Certificate for 130 shares of Consolidated gas stock, par value $13,000. Pay usually December & June.
5 6% bonds each $1,000. Bushwick R. R. (street) Brooklyn, N. Y., payable January & July, $5,000.

Correct list, 1891. W. J. Florence.

38 Continued.

100 shares San Miguel Gold Place Co., $10 per share. Don't know value it was given me.
25 shares German-American Insurance Co., each share $100. Par value $2,500. Interest payable January & July.
Lot on Connecticut avenue, bounded by 21st street, in the city of Washington, valued at $30,000. Cost me $16,500.
Have 9771 $\frac{60}{100}$ loaned on bond and mortgages in Washington city 6% Thos. J. Fisher, Esq., & Co. hold notes, No. 1324 F street, Washington, D. C.

This is a correct list of securities & given to my wife July, 1891.
W. J. FLORENCE.

39 *Order Allowing Defendant to File Cross-bill.*

Filed February 3, 1896.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

The defendant, Annie Teresa Coveney, having filed her answer in the above-entitled cause, and upon her motion by her solicitor, it is ordered and decreed, this 3rd day of February, A. D. 1896, leave be, and is hereby, granted to said defendant, Annie Teresa Coveney,

to file her cross-bill in said cause, which is now exhibited to the court.

By the court:

E. F. BINGHAM, *C. J.*

Cross-bill of Anna T. Coveney.

Filed February 3, 1896.

In the Supreme Court of the District of Columbia, Holding an Equity Court for the said District.

BENJAMIN F. CONLIN *against* PETER CONLIN ET AL. } In Equity. No. 16225, Dock. 38.

40 To the supreme court of the District of Columbia, holding an equity court for said District:

Your complainant, Anna Teresa Coveney, by this her cross-bill respectfully shows and represents as follows:

1. That on the 14th day of February, A. D. 1895, the defendant Benjamin F. Conlin herein, as complainant, filed his bill of complaint in the above-entitled cause against this complainant and others named as defendants therein; and, further, by said original bill the said defendant, Benjamin F. Conlin, alleged in substance that he and the other defendants in said bill of complaint (except your complainant herein) are the heirs-at-law of William J. Florence, deceased, and that your complainant is the widow of the said William J. Florence; that said William J. Florence died on the 19th day of November, A. D. 1891, seized in fee of lots twenty-three (23) and twenty-four (24), in John B. Alley's and Harvey Page's subdivision of lots in square ninety-two (92), situate in the city of Washington, District of Columbia, and that said William J. Florence died intestate, leaving said Benjamin F. Conlin and the defendants named in said bill of complaint as his heirs-at-law, and this complainant as his widow, and prayed a partition or sale of the said real estate and so forth; and your complainant, as defendant therein, shows that she filed her answer to the said bill of complaint, and in her said answer has shown and averred the fact to be that the said Benjamin F. Conlin, the complainant in said original bill, and the defendants named therein, and the said Charlotte L. Sullivan, also mentioned in said bill, as the heirs-at-law of said

William J. Florence, are not entitled to the relief therein
41 prayed, and that said William J. Florence died leaving a last will and testament duly executed according to law, and that said will and testament had been duly admitted to probate and — record, and that your complainant in this cross-bill of right and the rules and practice of equity and law ought to have relief in the premises; all which matters and things will more fully appear by reference to said bill of complaint and the answer of your com-

plain-t herein, which your complainant prays leave to read and refer to if need be.

2nd. That on or about the first day of January, 1853, the said William J. Florence and your complainant were lawfully married in the city of New York, State of New York, and from the date of their said marriage lived and cohabited together as man and wife until the death of the said William J. Florence on the 19th day of November, A. D. 1891, in the city of New York, State of New York.

3rd. That at the time of said marriage the said William J. Florence and your complainant were professional actor and actress, and it was mutually agreed by and between the said William J. Florence and your complainant, each should assist the other in their professional engagements and whatever profits or income should be derived from their said professional engagements should be the common property of the said William J. Florence and this complainant and should be the property of the survivor of them; and, further, that the said profits or income should be invested in real estate and in good paying securities for their benefit, and should become the property of the survivor of them; and, further, this complainant shows and avers the fact to be true that her said husband, William J. Florence, always attended to the business interests of his own, as well as that of your complainant, and always received and
42 took the profits arising from their professional engagements and would invest the same in real estate and also in good paying securities.

4. Your complainant shows, charges, and avers the facts to be true that she and the said William J. Florence were citizens of the United States and residents of the State of New York, domiciled therein for twenty-five years prior to the death of said William J. Florence in November, A. D. 1891; and, further, that by the laws of the State of New York during the whole of said period the property of which any testator died seized passed under his will, containing words of general gift or devise, without regard to the date of the will or of the time when he became seized of the real estate.

5. Your complainant further shows and avers the facts to be true that the said William J. Florence and your complainant having neither children or descendants, and having accumulated their property, both real and personal, by their joint efforts, and having in view the statute of New York as to the scope of a *will* devising all one's real estate, mutually agreed with each other that each should devise and bequeath to the other, their heirs, executors, administrators, and assigns, all estate, both real and personal, which each then had, as well as such other property as each should thereafter acquire and die seized and possessed of, and that in pursuance of the said contract or agreement the said William J. Florence did make and execute the last will and testament hereinafter mentioned in favor of complainant, and this complainant did make her
43 will and testament in favor of the said William J. Florence in like form, manner, and words as is contained in the said will and testament of said William J. Florence.

6. Your complainant further shows and avers the fact to be true that the said William J. Florence departed this life in the city of Philadelphia, State of Pennsylvania, having previously made and executed according to law his last will and testament bearing date the 5th day of May, A. D. 1876, wherein and whereby he ordered and directed the payment of his debts and funeral expenses to be paid by your complainant as his executrix; and, further, by his said will he gave, devised, and bequeathed unto your complainant all his estate, real and personal, and such as he should die seized and possessed —, wheresoever and whatsoever; to have and to hold to your complainant, her heirs, executors, administrators, and assigns, according to the nature and quality of the estate, forever, and appointed your complainant executrix of his said will, as will more fully appear by a certified copy of said will and testament filed with the answer of this complainant (as defendant herein) to the bill of complaint in this cause, marked Exhibit A. T. C. No. 1, which your complainant prays leave to now refer to and make part of this her cross-bill.

7. Your complainant further shows and avers the fact to be true that the aforesaid will of said William J. Florence was duly admitted to probate and record in the surrogate's court held in and for the county of New York, State of New York; all of which will more fully appear by an exemplified transcript of record of the proceedings in said surrogate's court in the matter of said will and testament of said William J. Florence, annexed and marked Exhibit A. T. C. No. 1 as part of her answer to the said bill of
44 complaint, which she prays leave to read, refer to, and make part hereof.

8. Your complainant further shows and avers that afterwards, on the 2d day of June, A. D. 1892, under and by virtue of an act of Congress of the 9th day of July, 1888 (25 U. S. Stat. at Large, p. 246), a certified copy of said will of said William J. Florence was duly filed in your honorable court, holding a special term of said court for orphans' court business, and the same was duly recorded in Will Book No. 31, folio 460, of the registers of wills' office of the District of Columbia, as will fully appear by reference to the said certified copy and record thereof in said register of wills' office, of which said Exhibit A. T. C. No. 1 is a true copy, and which this complainant pray sleave to read, refer to, and make part hereof.

9. That a part of the real estate of which said William J. Florence died seized — possessed was said lots twenty-three (23) and twenty-four (24), in said John B. Alley's and Harvey Page's recorded subdivision of lots in said square ninety-two, situated and being in the city of Washington, District of Columbia.

10. That said William J. Florence left as his only heirs-at-law the defendants in this cross-bill, to wit, Benjamin F. Conlin, Peter Conlin, Mary Jane Wyard (*née* Conlin), brothers and sister of said William J. Florence; Mary Maddox (*née* Conlin), wife of Harry L. Maddox and daughter and only heir-at-law of Edward B. Conlin, a deceased brother of said William J. Florence; Winifred Cook,

wife of George S. Cook; Virginia Segeman, wife of Victor A. Seggeman; Charlotte C. Sullivan, wife of John C. Sullivan; the only children of Winifred Tooker, deceased, a sister of said Wil-
45 liam J. Florence, and Lucretia A. Tooker (a resident of New York city); Charlotte Louise Conlin Lisiecki, wife of John Lisiecki, and Mary Jane Conlin, Georgiana Conlin, and Frances Cecelia Conlin are the only children of John Conlin, deceased, a brother of said William J. Florence.

11. That after making of the said will and the acquiring of the said real estate hereinbefore described the said William J. Florence again and again reiterated his understanding of the agreement under which the said wills were made, and declared it to be his understanding that his will then executed and after his death admitted to probate and record in the said State of New York and the District of Columbia included the said real estate hereinbefore mentioned, and that on his death it vested in this complainant, her heirs and assigns; and, further, the said William J. Florence made said agreement in good faith, and fully believed that he had made a valid will pursuant to his said agreement with this complainant, and that it included all property, both real and personal, of which he should die seized and possessed and whenever acquired; and your complainant further avers the fact to be true that said William J. Florence, to show his intention of carrying out his compact or agreement aforesaid with this complainant and to show that he fully believed he had carried out said compact and agreement, and in order that your complainant might know what property would come to her upon his death, he, said William J. Florence, in the summer of A. D. 1891, and shortly before his death, gave to your complainant a list of the securities and assets of his estate, including, among other things, the aforesaid described real estate, to wit, as "lot 21st
46 street in the city of Washington," a certified copy of which said list your complainant herewith files, marked Exhibit A. T. C. No. 2, as part hereof, which she prays leave to read, refer to, and make part hereof, the original of which she will produce at the trial hereof.

The premised considered, your complainant in this her cross-bill prays as follows:

1. That said Benjamin F. Conlin, Peter Conlin, Mary J. Wiard, Mary Ellen Maddox and her husband, Harry L. Maddox; Winnifred Cook; her husband, George S. Cook; Virginia Seggeman, her husband, Victor A. Seggeman; Charlotte L. Conlin Lesiecki, her husband, John Lisiecki; Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Charlotte L. Sullivan, and Lucretia A. Tooker be made party defendants hereto.

2. That a decree be passed herein by your honorable court adjudging and decreeing that said real estate described in this cause, to wit, said lots twenty-three (23) and twenty-four (24), in said square ninety-two (92), is vested in your complainant, her heirs and assigns, in fee-simple absolute.

3. That the said named defendants and plaintiff mentioned in

the said original bill in the cause and named as defendants in this cross-bill be declared to have and hold the said described real estate as trustees for your complainant, her heirs and assigns.

4. That the said named defendants herein be decreed within twenty days from the date of a decree to convey to your complainant, her heirs and assigns, the said real estate in fee-simple absolute.

47 5. That your complainant may have such other and further relief as to your honors may seem right and proper and the nature of her case may require.

To which end your complainant in this her cross-bill prays for process against the defendants Benjamin F. Conlin, Peter Conlin, Mary J. Wiard, Mary Ellen Maddox, Harry L. Maddox, Winnifred Cook, George S. Cook, Virginia Seggeman, Victor A. Seggeman, Charlotte L. Conlin Lisiecki, John Lisiecki, Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Lucretia A. Tooker, and Charlotte L. Sullivan, requiring each of them to appear and answer the exigency of this cross-bill without oath to their or either of their answers, your complainant hereby waiving oath to their or either of their answers.

ANNIE T. COVENEY,
Complainant.

WILLIAM J. MILLER.
Solicitor for Complainant.

STATE OF NEW YORK, }
County of New York, } *ss:*

I, Annie Teresa Coveney (formerly Annie Teresa Florence), do solemnly swear that I have read the foregoing bill of complaint by me subscribed, and that I know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

ANNIE T. COVENEY.

48 Subscribed and sworn to before me, a notary public in and for the county of New York, State of New York, by Annie Teresa Coveney, this 31st day of January, A. D. 1896.

[SEAL.] D. E. SEYBEL,
Notary Public, N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that D. E. Seybel, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State and for general purposes;

that I am well acquainted with the handwriting of said notary and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 31st day of January, 1896.

[SEAL.] HENRY D. PURROY, *Clerk.*

49 *The Bill of Revivor of Cross-bill, &c.*

Filed May 23, 1896.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

BENJAMIN F. CONLIN *vs.* PETER CONLIN ET AL. } In Equity. No. 16235.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainant, Annie Teresa Coveney, respectfully shows that heretofore, on the 3d day of February, A. D. 1896, she filed her cross-bill of complaint against Benjamin F. Conlin, complainant in the above-entitled cause, and the defendants Peter Conlin, Mary J. Wiard, Mary Ellen Maddox, Harry L. Maddox, Winnifred Cook, George S. Cook, Virginia Seggeman, Victor A. Seggeman, Charlotte L. Conlin Lisiecki, John Lisiecki, Mary J. Conlin, Georgiana Conlin, Frances Cecelia Conlin, Lucretia A. Tooker, and Charlotte L. Sullivan, and praying (among other things) that a decree be passed in the said cause adjudging and decreeing that the said real estate described in said cause is vested in your complainant in said cross-bill; that said defendants in said cross-bill be declared to have and to hold the said real estate as trustees for your complainant, and that said defendants in said cross-bill be ordered and decreed within twenty days from the date of a decree to convey to your complainant, her heirs and assigns, the said real estate described in said original and in said cross bill, and further prayed for such other and further relief in the premises, all which will more fully and
50 at large appear by said cross-bill, which your complainant herein prays leave to read and make part hereof.

2. Your complainant shows that to the original bill of complaint she filed her answer on the 3rd day of February, A. D. 1896, but she is informed and believes, and so believing says, that the other defendants have not filed answers to said original bill of complaint, and they have not filed answers to her cross-bill of complaint, and no service of process or publication has been had or made against said defendants in said cross-bill.

3. Your complainant in said cross-bill and as defendant in said original bill of complaint charges and avers that before said cause was brought to hearing, either on said original or on said cross bill,

the said defendant, Mary Ellen Maddox (whose real name is Mary Eleanor, and is called in said original and cross bill Mary Ellen Maddox), departed this life in the city of New York, in State of New York, on or about the 2d day of April, A. D. 1896, *intestate*, leaving surviving her a daughter, Frances Lindsly Maddox, as her only child and heir-at-law, and who is now about the age of six (6) months.

4. Your complainant further shows she is advised that her cross-suit having abated by the death of said defendant, Mary Ellen Maddox (called Mary Eleanor Maddox), she is entitled to have the same revived against the said Frances Lindsly Maddox, and to be put in the same plight and condition as the same were in at the time of the death of said defendant, Mary Ellen Maddox.

The premises considered, your complainant prays as follows:

51 1. That her said cross-bill may be revived against the said defendant, Frances Lindsly Maddox.

2. That said defendant, Frances Lindsly Maddox, may answer complainant's said cross-bill.

3. That a guardian *ad litem* may be appointed to answer for said infant defendant, Frances Lindsly Maddox.

4. That your complainant may have publication against said defendant, Frances Lindsly Maddox.

5. That complainant, by her said cross-bill and this her bill of revivor, may have such further and other relief as to your honors may seem right and proper.

To which end your complainant prays the writ of subpœna against said defendant, Frances Lindsly Maddox, commanding her to appear and answer the premises and show cause, if any she has, why the said suit should not be revived against her as prayed.

ANNIE T. COVENEY.

W. J. MILLER,
Sol'r for Complainant in Cross-bill.

STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Annie Teresa Coveney, do solemnly swear that I have read the foregoing complaint by me subscribed, and that I know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those facts therein stated upon information and belief I believe the same to be true.

52

ANNIE T. COVENEY.

Subscribed and sworn to before me, a notary public in and for the county of New York, State of New York, by Annie Teresa Coveney, this 8th day of May, A. D. 1896.

MORGAN D. McDONEGAL,
[SEAL.] *Notary Public in and for County of New York, N. Y.*

I hereby waive copy of the within, and state Mrs. Mary Ellen (Mary Eleanor) Maddox departed this life as stated in the within bill of revivor, leaving said Frances Lindsly Maddox as her only child and heir-at-law.

JAMES FRANCIS SMITH,
Solicitor for Defendants in Cross-bill.

1896, May 19th.

Bill of Revivor.

Filed May 23, 1896.

In the Supreme Court of the District of Columbia, Sitting in Equity.

BENJAMIN F. CONLIN
vs.
PETER CONLIN. } Equity. No. 16225.

To the supreme court of the District of Columbia, holding an equity court for said District:

53 The complainant, Benjamin F. Conlin, respectfully showeth that heretofore, to wit, on the — day of ——, 1895, he filed an original bill against Peter Conlin, Mary Jane Wiard, Mary Ellen Maddox and Harry L. Maddox, her husband; Winifred Cook and George S. Cook, her husband; Virginia Seggerman and Victor A. Seggerman, Charlotte L. Conlin Lisiecki and John Lisiecki, her husband; Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Lucretia A. Tooker and Annie Teresa Coveney, said parties being the heirs-at-law and widow of William J. Florence, deceased, praying for the partition of lots numbered twenty-three (23) and twenty-four (24), in John B. Alley's and Harvey Page's subdivision of square numbered ninety-two (92), as recorded in the office of the surveyor of the District of Columbia, of which real estate the said William J. Florence died seized.

None of the parties defendant have answered said original bill except the defendant Annie Teresa Coveney, who filed an answer and cross-bill on the — day of February, 1896.

2. The defendant Mary Ellen Maddox died intestate in the city of New York and the State of New York on or about the 2nd day of April, 1896, without filing an answer to the original or cross-bill and before the cause was brought to hearing on said original or cross-bill, leaving surviving her one child, a daughter and heir-at-law who is now about the age of six months.

3. The complainant is advised that this original bill having abated as to the said Mary Ellen Maddox by her death, and that she is entitled to have the same revived against the said Frances Lindly Maddox—

54 He therefore prays:

1. That the said cause be revived against the said Frances Lindsey Maddox.

2. That a guardian *ad litem* be appointed to answer for said infant defendant, Frances Lindsley Maddox.

And for such other and further relief as the nature of the case may require.

JAMES FRANCIS SMITH,
Sol'r for Complainant.

Amended Bill, &c.

Filed June 10, 1896.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

To the supreme court of the District of Columbia, holding an equity court for said District:

Your complainant, Benjamin F. Conlin, states as follows by leave of the court first had and obtained:

1. That on the 14th day of February, 1895, he filed his original bill against the defendants herein, praying for the partition of certain real estate as one of the heirs-at-law of William J. Florence, deceased, which said original bill he prays to be made part hereof.

55 2. That none of the defendants herein have as yet made answer to said original bill except the defendant Annie Teresa Coveney, who filed an answer and cross-bill on the 3rd day of February, 1896.

3. That afterwards Mary Ellen Maddox, one of the defendants in said original bill and also in said cross-bill, died, leaving Frances Lindsley Maddox as her only child and heir-at-law, and that the above-entitled cause was revived as to the said Frances Lindley Maddox, and said Frances Lindley Maddox made defendant both to the original and cross bills herein by order of the court.

4. That the complainant in her original bill omitted to make Joseph H. Tooker, Jr., one of the heirs-at-law of Winnifred Tooker, deceased, and of full age, a party defendant; the said Joseph H. Tooker, Jr., and Winnifred Cook, Virginia Seggerman, parties defendant to the original bill, and Charlotte L. Sullivan are the only children and heirs-at-law of Winnifred Tooker, deceased, and the complainant is advised that the said Joseph H. Tooker, Jr., is a necessary party to his original bill and is entitled to one-fourth of one-sixth of the real estate described in the original bill.

Wherefore he prays:

That the said defendant, Joseph H. Tooker, be made a party defendant to his original bill.

That the writ of subpœna be issued to him, requiring him to answer, but without oath, the averments of the original and amended bills, and for such other and further relief as the nature of the case may require.

JAMES FRANCIS SMITH,
Solicitor for Complainant, Benjamin F. Conlin.

56 Endorsed.

Leave to file granted.

W. S. COX, *J.*

Joint and Several Answer of Defendants.

Filed June 11, 1896.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

Joint and several answers of defendants, Peter Conlin, Mary Jane Wiard, Winnifred Cooke, George J. Cooke, Virginia Seggerman, Victor A. Seggerman, Joseph H. Tooker, Jr., Charlotte L. Conlin Lisiecki, John Lisiecki, Mary Jane Conlin, Georgiana Clare Conlin, Frances Cecelia Conlin, Lucretia A. Tooker, to the original and amended bill.

The defendants, Peter Conlin, Mary Jane Wiard, Winnifred Cooke, George J. Cooke, Virginia Seggerman, Victor S. Seggerman, Joseph H. Tooker, Jr., Charlotte L. Conlin Lisiecki, John J. Lisiecki, Mary Jane Conlin, Georgiana Clare Conlin, Frances Cecelia Conlin, Lucretia A. Tooker, jointly and severally answering the original and amended bills, state as follows:

1. They admit that the plaintiff, Benjamin F. Conlin, is a
57 citizen and resident of Brooklyn, in the State of New York, and that he is a brother and one of the heirs-at law of Wm. J. Florence, deceased; that the family name of the said William J. Florence was Conlin, and that he was christened by the name of William J. Conlin, but in after life adopted the name of Florence and transacted all his business and held the title to the real estate described in the bill, situated in the city of Washington, District of Columbia, in the name of William J. Florence; that he was in his lifetime a resident of the city and State of New York.

2. Answering paragraph two of the original, bill these defendants admit that the defendant Peter Conlin is a brother and one of the heirs-at-law of the said William J. Florence, deceased; that he is of full age and a citizen and resident of New York city. They admit that the defendant Mary Jane Wiard is a citizen and resident of Boston Cambridge, Massachusetts, and that she is of full age, a sister and one of the heirs-at-law of the said William J. Florence, deceased. They admit that the defendant Mary E. Maddox was the only heir-at-law of Edward B. Conlin, deceased, who was a brother of the said William J. Florence, deceased, and that she was the wife of Harry L. Maddox, but says that since the filing of the original bill herein the said Mary E. Maddox died intestate, leaving surviving her one child, a daughter and heir-at-law, Frances Lindsley Maddox, who

is an infant. They admit that the defendant Winifred Cooke, wife of the defendant George J. Cooke, and the defendant Virginia Seggermann, wife of Victor A. Seggerman, and Charlotte L. Sullivan, wife of John C. Sullivan, are all children and heirs-at-law of Winnifred Tooker, deceased, who was a sister of William J. Florence, deceased, and that they are citizens and residents of New
58 York city and of full age, and that the said Charlotte L. Sullivan conveyed all her right, title, and interest as an heir-at-law of the said William J. Florence to the defendant Lucretia A. Tooker, who is a citizen of full age and resident of New York city. These defendants admit that the said Winnifred Tooker left one other child and heir-at-law, as set out in the amended bill, namely, Joseph H. Tooker, Jr., who is of full age and a citizen and resident of White Plains, New York. They admit that the defendant Charlotte L. Conlin Lisiecki, wife of John Lisiecki, and the defendants Mary Jane Conlin, Georgiana Conlin, and Frances Cecelia Conlin are the only children and heirs-at-law of John Conlin, deceased, who was a brother of the said William J. Florence, deceased, and that they are of full age and citizens and residents of New York city. They admit that the defendant Annie Teresa Coveney was the widow of the said William J. Florence, deceased, and since his death has intermarried with — Coveney.

3. Answering paragraph three of the original bill, these defendants admit that the said William J. Florence died on the 19th day of November, A. D. 1891, seized in fee of the real estate described in the bill, namely, lots numbered twenty-three (23) and twenty-four (24), in John B. Alley's and Harry Page's subdivision of lots in square numbered ninety-two (92), as recorded in the land records of the District of Columbia.

4. Answering paragraph four, these defendants admit that as to the said real estate the said William J. Florence died intestate, leaving the defendants, Annie Teresa Coveney, his widow, who is entitled to dower therein, and Benjamin F. Conlin, Peter Conlin, Mary
59 Jane Wiard, Mary L. Maddox, Winnifred Cook, Virginia Seggermann, Charlotte L. Sullivan, Joseph H. Tooker, Jr., Charlotte L. Conlin Lisiecki, Mary Jane Conlin, Georgiana Clare Conlin, and Frances Cecelia Conlin, his heirs-at-law to whom these defendants are advised the said described real estate descends in common, subject to the dower right of the said widow. These defendants further admit that the said Charlotte L. Sullivan conveyed her interest to the defendant Lucretia A. Tooker, and say that the interest of Mary E. Maddox descended upon her death to her daughter, Frances Lindsley Maddox.

5. Answering paragraph five, these defendants admit that the complainant, Benjamin F. Conlin, and the defendants Peter Conlin and Mary Jane Wiard are each entitled to one-sixth part of said real estate. They admit that Mary Ellen Maddox was entitled to one-sixth part, which interest descends on her death to her only child and heir-at-law, Frances Lindsley Maddox. They admit that the defendants Charlotte L. Conlin Lisciecki, Mary Jane Conlin, Geor-

giana Clare Conlin, and Frances Cecelia Conlin are each entitled to one-fourth of one-sixth part. These defendants say that the defendants Winifred Cooke, Virginia Seggermann, Lucretia A. Tooker, together with Joseph H. Tooker, Jr., are each entitled to one-fourth of one-sixth part, and not one-third, as averred in the original bill, the said Joseph H. Tooker, Jr., having been omitted as party defendant in the original bill and afterwards made a party by an amended bill filed by the complainant, all of the averments of which said amended bill are hereby admitted. These defendants pray with said complainant that partition of the hereinbefore-described premises
60 may be made to each of the parties entitled, so that they may each hold his or her respective share in severalty; or if in the opinion of the court the said premises cannot be specifically divided so as to set off to each part entitled his or her share in severalty without manifest injury to them, that for the purpose of partition the dower of the said Annie Teresa Coveney may be assigned to her in such manner and form as the court may determine, and that the said real estate may be sold and the proceeds divided between and among the parties hereto as the court may find them to be entitled.

JOSEPH H. TOOKER, JR.
MARY J. WIARD.
PETER CONLIN.
MARY JANE CONLIN.
GEORGIANA CLARE CONLIN.
FRANCES CECELIA CONLIN.
CHARLOTTE L. CONLIN LISIECKI.
VIRGINIA T. SEGGERMANN.
WINIFRED COOKE.
LUCRETIA A. TOOKER.
V. A. SEGGERMANN.
GEORGE J. COOKE.
JOHN J. LISIECKI.

61 *Amended Bill to Cross-bill.*

Filed June 12, 1896.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

To the supreme court of the District of Columbia, holding an equity court for said District:

Your complainant, Annie Teresa Coveney, in her cross-bill filed in the above-entitled cause, by leave of the court first had and obtained, now comes, and, by leave of the court also first had and obtained, shows:

1. That on the 14th day of February, A. D. 1895, complainant, Benjamin F. Conlin (defendant in her said cross-bill), filed his bill of complain*ant* against your complainant and others for the sale of certain real estate therein described.

2. That she filed her answer thereto on the 3rd day of February, A. D. 1896, which she prays leave to read and refer to, if need.

3. That on the 3 day of February, A. D. 1896, — by leave of the court filed her cross-bill against the said Benjamin F. Conlin, Peter Conlin, and others, claiming the fee title to said real estate, as will more fully appear by said cross-bill, which she prays leave to read, refer to, and make part hereof.

61½ 4. That the other of said defendants have not answered the said original bill.

5. That the said defendants have not answered her said cross-bill.

6. That afterwards Mary Ellen Maddox, one of the defendants in said original bill and also in said cross-bill, departed this life, leaving Frances Lindsley Maddox as her only child and heir-at-law; and, further, the said respective cause was revived by amended bills as to the said Frances Lindsley Maddox by leave of the court, and she was made a party defendant in said original and cross bill.

7. That the complainant in said original bill filed by him omitted to make Joseph H. Tooker, one of the heirs-at-law of Winnifred Tooker, deceased, a party defendant.

8. That since the filing of said bill of revivor making said Frances Lindsley Maddox a party defendant in said original and cross bill the said complainant in said original bill has by leave of the court made said Joseph H. Tooker a defendant to his original bill.

9. That your complainant is informed and believes that the said defendant, Joseph H. Tooker, is a necessary and proper party to her cross-bill; and, further, that said defendant, Joseph H. Tooker, is a resident of White Plains, State of New York.

The premises considered, your complainant prays as follows:

1. That said defendant, Joseph H. Tooker, be made a party defendant to her said cross-bill.

62 2. That her answer to said original bill may stand as her answer to said amended bill making said Joseph H. Tooker defendant to said original bill.

3. That said defendant, Joseph H. Tooker, answer her said cross-bill, oath to said answer being hereby expressly waived.

4. That she may have the same relief against said defendant, Joseph H. Tooker, as prayed in her said cross-bill against the other defendants in said cross-bill.

5. That she may have such other and further relief as the nature of her case may require.

The premises considered, your complainant prays process against said defendant, Joseph H. Tooker, to appear and answer the exigency of said cross-bill and amendments thereto, without oath to said answer, as the same is hereby expressly waived.

WILLIAM J. MILLER,
Solicitor for Complainant, Anna Teresa Coveney.

Commission to Appoint Guardian ad Litem.

Filed September 1, 1896.

In the Supreme Court of the District of Columbia, the 6th Day of August, 1896.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

63 The President of the United States to John J. Farrell, William Nelson, Edward H. Mead, New York, N. Y., Greeting:

Know ye that because, by a special order of said court in the above-entitled case, you have been assigned to appoint a guardian for the defendant Frances Lindsley Maddox, of New York, N. Y., alleged to be under the age of twenty-one years, and by said guardian to take the answer of said infant defendant, these, therefore, are to empower you or any two of you to go to said defendant, if she cannot conveniently come to you, and appoint a guardian for said infant and take the answer of said infant, by such guardian, upon his oath or affirmation, to be administered by you or any two of you, and, having so done, you are to send the same, closed up under your seals, together with your certificate of your having appointed such guardian as aforesaid, to the said court without delay.

Witness E. F. Bingham, chief justice.

[SEAL.]

J. R. YOUNG, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk.*

We, whose names are hereunto subscribed, in pursuance of the foregoing commission to us directed, did, on the 1st day of July, 1896, cause Frances Lindsley Maddox, the infant in the said commission named, to come before us at New York city, in the
64 county of New York, in the State of New York, and we there and then assigned John Flood to be her guardian to answer and defend this suit on her behalf, and the answer of the said Frances Lindsley Maddox, the said infant, was taken, and the said John Flood, as guardian, was duly sworn to the truth thereof at the time and place aforesaid and by virtue of the said commission.

Before us:

JOHN J. FARRELL,
WILLIAM NELSON,
EDWARD A. MEAD,
Commissioners.

The answer of Frances Lindsley Maddox, defendant, to the bill of complaint of Benjamin F. Conlin, complain-t, filed against her and others in the supreme court of the District of Columbia, No. 16225, equity.

The said defendant says that she is an infant, under the age of twenty-one years, and that she claims such interest in the premises as she is entitled to, and submits her said interest to the protection of this honorable court, and prays to be hence dismissed with reasonable costs.

JOHN F. FLOOD, *Guardian.*

Subscribed and sworn before us the 31st day of August, 1896.

JOHN J. FARRELL,
WILLIAM NELSON,
EDWARD A. MEAD,
Commissioners.

65 *Amendment & Exhibit.*

Filed November 18, 1896.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

BENJAMIN F. CONLIN *against* PETER CONLIN ET AL. } In Equity. No. 16225.

To the supreme court of the District of Columbia, holding an equity court for said District:

Now comes the complainant, Anna Teresa Coveney, by leave of the court first had and obtained, — amends her original cross-bill of complaint filed in the above-entitled cause by adding to said original cross-bill between the ninth (9th) and tenth (10th) paragraphs thereof the following paragraph by way of amendment, to wit:

9½. That said William J. Florence purchased in fee-simple the said described real estate, to wit, said lots twenty-three (23) and twenty-four (24), in said John B. Alley's and Harvey L. Page's recorded subdivision of lots in square numbered ninety-two (92), from George Ernest Hamilton, on or about the 22nd day of April, A. D. 1887, who by his deed of conveyance bearing date the 22nd day of April, A. D. 1887, conveyed said lots in fee-simple to said William J. Florence, his heirs and assigns, forever, as will fully appear by reference to said deed of conveyance, duly recorded in Liber No. 1258, folio 156, one of the land records of the District of Co-
66 lumbia, on the 11th day of May, A. D. 1887, a certified copy of which is herewith filed, marked A. A., which, together with said land record containing said deed, your complainant prays leave to read and make part hereof and of her said original cross-bill, if need be.

The premises considered, your complainant prays said defendants named in said original cross-bill, amended cross-bill, and bill of revivor may answer as if the above additional to said cross-bill by way of amendment had been originally made a part thereof, complainant in said cross-bill and this amendment thereof hereby waiving answer under oath to said original and amended and cross bill.

ANNIE T. COVENEY.

W. J. MILLER,
Solicitor for Complainant in Cross-bill.

The complainant in original bill of complaint and defendants in said cross-bill, by their solicitor, hereby consent to the filing of the annexed amended cross-bill of complaint, and service of copy of amendment is hereby acknowledged.

JAMES FRANCIS SMITH,
Solicitor for Respondents in Cross-bill.

67 EXHIBIT A. A.

Liber 1258, folio 156.

Trustee's Deed.

Recorded May 11, 1887, 11.29. a. m.

This indenture made this 22nd day of April in the year of our Lord one thousand eight hundred and eighty-seven by and between George Ernest Hamilton of the city of Washington in the District of Columbia as trustee in equity cause numbered 9757 on the equity docket No. 25 of the supreme court of the District of Columbia wherein Martin F. Morris is complainant and Margaret Merrick and others are defendants as party of the first part, and William J. Florence of the city and county of New York, in the State of New York, as party of the second part, witnesseth that in consideration of the sum of fifteen thousand seven hundred and twelve dollars and fifty cents ($15712.50) in lawful money of the United States to him in hand paid by the party of the second part at the ensealing and before the delivery of these presents, the receipt whereof is hereby acknowledged and in pursuance of the proceedings had in the aforesaid equity cause the said George Ernest Hamilton trustee the party of the first part, hath given, granted, bargained, and sold and doth hereby give, grant, bargain and sell unto the said William J. Florence, the party of the second part and his heirs and assigns forever. All those pieces or parcels of land situated in the city of Washington in the District of Columbia and known and described as lots numbered twenty-three (23) and twenty-four (24) in John B. Alley's and Harvey L. Page's recorded subdivision of lots in square numbered ninety-two (92) according to the official records of the plat of said city of Washington, together with the improve-
68 ments and appurtenances thereunto belonging and all the right title, interest and estate of the parties to this cause in

the premises. To have and to hold the said lots of ground and premises with the appurtenances unto and to the use of said party of the second part, and his heirs and assigns forever.

In testimony whereof, the said George Ernest Hamilton, trustee as aforesaid, the party of the first part has hereunto set his hand and affixed his seal on the day and year first hereinbefore written.

GEORGE ERNEST HAMILTON, *Trustee.* [SEAL.]

Signed, sealed, and delivered in the presence of
EDWARD J. STELLWAGEN.

DISTRICT OF COLUMBIA, *County of Washington,* } *To wit:*

I, Edward J. Stellwagen, a notary public in and for the District of Columbia, do hereby certify that George Ernest Hamilton, party as trustee to a certain deed bearing date on the 22nd day of April, A. D. 1887, and hereunto annexed, personally appeared before me in the District aforesaid, the said George Ernest Hamilton being personally well known to me to be the person who executed said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this 22nd day of April, A. D. 1887.

[SEAL.] EDWARD J. STELLWAGEN,
Notary Public, D. C.

69 Endorsed.

Fee, $1.50.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 1258, fol. 156 *et seq.*, one of the land records of the District of Columbia.

Office of the recorder of deeds, Washington, D. C., October 20, 1896.

[SEAL.] GEORGE F. SCHAYER,
Dep. Recorder of Deeds.

70 *Commission to Get Infant's Answer.*

Filed December 8, 1896.

In the Supreme Court of the District of Columbia, the 28th Day of November, 1896.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

The President of the United States to William Nelson, John J. Farrell, and Edward A. Mead, of New York city, N. Y., Greeting:

Know ye that because, by a special order of said court in the above-entitled case, you have been assigned to appoint a guardian for the

defendant Frances Lindsley Maddox, alleged to be under the age of twenty-one years, and by said guardian to take the answer of said infant defendant to the cross-bill, amended and cross bill, and bill of revivor of Annie T. Coveney, these, therefore, are to empower you or any two of you to go to said defendant, if she cannot conveniently come to you, and appoint a guardian for said infant and take the answer of said infant, by such guardian, upon his oath or affirmation, to be administered by you or any two of you; and, having so done, you are to send the same, closed up under your seals, together with your certificate of your having appointed such guardian as aforesaid, to the said court without delay.

71 Witness E. F. Bingham, chief justice.

[SEAL.] J. R. YOUNG, *Clerk*,
By M. A. CLANCY, *Ass't Clerk*.

We, whose names are hereunto subscribed, in pursuance of the foregoing commission to us directed, did, on the 5th day of December, 1896, cause Frances Lindsley Maddox, the infant in the said commission named, to come before us at New York city, in the county of New York, in the State of New York, and we then and there assigned John F. Flood to be her guardian to answer and defend this suit on her behalf, and the answer of the said Frances Lindsley Maddox, the said infant, was taken, and the said John F. Flood, as guardian, was duly sworn to the truth thereof at the time and place aforesaid and by virtue of the said commission.

Before us:

WILLIAM NELSON,
JOHN J. FARRELL,
EDWARD A. MEAD,
Commissioners.

The answer of Frances Lindsley Maddox, defendant, to the cross-bill of complaint, amended cross-bills, bill of revivor of Annie T. Coveney, complain-t, filed against her and others in the supreme court of the District of Columbia, No. 16225, equity.

The said defendant says that she is an infant under the age of twenty-one years, and that she claims such interest in the premises as she is entitled to, and submits her said interest to the pro-

72 tection of this honorable court, and pray- to be hence dismissed with reasonable costs.

JOHN F. FLOOD, *Guardian*.

Subscribed and sworn before us the 5th day of December, 1896.

WILLIAM NELSON,
JOHN J. FARRELL,
EDWARD A. MEAD,
Commissioners.

Answer of Harvey L. Maddox.

Filed December 10, 1896.

In the Supreme Court of the District of Columbia.

CONLIN
vs.
COVENEY ET AL. } Equity. No. 16225.

Answer of Harvey L. Maddox to original bill, amended bill, and bill of revivor.

The defendant Harvey L. Maddox admits all the allegations of the original and amended bills and the bill of revivor, and consents to the sale of the real estate described in said original bill; and the said defendant further relinquishes all right, title, and interest in and to the said real estate, and to the proceeds thereof, to his daughter, Frances Lindsley Maddox.

HARVEY L. MADDOX.

Witnesses:
JOHN F. FLOOD.
E. A. MEAD.

73 *Demurrer to Cross-bill, &c.*

Filed February 4, 1897.

In the Supreme Court of the District of Columbia.

CONLIN
vs.
CONLIN ET AL. } Equity. No. 16225.

Demurrer of Benjamin F. Conlin, Peter Conlin, Mary J. Wiard, Harvey L. Maddox, Winnifred Cook, George S. Cook, Virginia Seggerman, Victor A. Seggerman, Charlotte L. Conlin Lisiecki, John Lisiecki, Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Frances Lindsley Maddox, Lucretia A. Tooker, Joseph H. Tooker, and Charlotte L. Sullivan to the cross-bill and amended cross-bill of complainant of Anna Teresa Coveney in chancery exhibited.

These defendants, by protestation, not confessing or admitting all or any of the matters and things in the said cross-bill and amended cross-bill to be true in manner and form as the same are therein set forth, do demur thereto and for cause of demurrer show:

1. That the said Anna Teresa Coveney has not in her said cross-bill stated such a case as to entitle her to such relief as is thereby prayed for against these defendants to the cross-bill.

2. Wherefore, and for divers other errors and imperfections, these

defendants demand the judgment of this court whether they shall be compelled to make any further answer to the said cross-bill, and pray that the same be dismissed.

JAMES FRANCIS SMITH,
Sol'r for Above-named Defendants to Cross-bill.

74 In my opinion the foregoing demurrer is well founded in point of law.

JAMES FRANCES SMITH, *Sol'r.*

STATE OF NEW YORK, *City and County of New York,* } *ss:*

Peter Conlin, being duly sworn, deposes and says that he is one of the defendants to the cross-bill in the above-entitled cause, and one of the defendants referred to in the above demurrer. Affiant says that the aforesaid demurrer is not interposed for delay.

PETER CONLIN.

Subscribed and sworn to before me the 30th day of January, 1897.

ROB'T S. PETERSON,
Notary Public, N. Y. Co., N. Y.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Rob't S. Peterson, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and author-
75 ized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 30th day of January, 1897.

[SEAL.] HENRY D. PURROY, *Clerk.*

Decree Overruling Demurrer.

Filed September 24, 1897.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

BENJAMIN F. CONLIN *vs.* PETER CONLIN ET AL. } In Equity. No. 16225.

The above-entitled cause came on for hearing on the demurrer to the cross-bill of said defendant, Annie Teresa Coveney, filed in said cause, and the said cross-bill and demurrer thereto, with other

proceedings had and exhibits in said cause, having been duly read and argued by counsel and submitted to and considered by the court, it is thereupon, this 21st day of September, A. D. 1897, adjudged, ordered, and decreed that said demurrer to said cross-bill be, and the same is hereby, overruled with costs to said Annie Teresa Coveney, complainant in said cross-bill, upon said demurrer,
76 for which she may have execution as at law, and further leave be, and is hereby, granted to said defendants in said cross-bill to answer or plead to the same within thirty days from the date of this decree, as they may be advised.

By the court:

A. B. HAGNER,
Asso. Justice.

Answer to Cross-bill.

Filed December 9, 1897.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } No. 16225. Equity.

Answer to cross-bill of defendants Benjamin F. Conlin, Peter Conlin, Mary Jane Wiard, Harvey L. Maddox, Winnifred Cook, George S. Cook, Virginia Seggerman, Victor A. Seggerman, Charlotte L. Conlin Lisiecki, John Lisiecki, Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Lucretia Tooker, Joseph H. Tooker.

The defendants Benjamin F. Conlin, Peter Conlin, Mary Jane Wiard, Harvey L. Maddox, Winnifred Cook, George S. Cook, Virginia Seggerman, Victor A. Seggerman, Charlotte L. Conlin Lisiecki, John Lisiecki, Mary Jane Conlin, Georgiana Conlin, Frances Cecelia Conlin, Lucretia Tooker, and Joseph H. Tooker, for
77 answer to the cross-bill of Anna Teresa Coveney filed in the above-entitled cause, say as follows:

1. They admit that the defendant Benjamin F. Conlin filed his original bill in this cause, and that thereupon proceedings were had thereunder substantially as set forth in the 1st paragraph of the cross-bill, but, for greater accuracy as to said proceedings, they refer to the record in said cause.

2. They believe it to be true, as is alleged in the 2nd paragraph of said cross-bill, that the said William J. Florence and the said Anna Teresa Coveney were married in 1853, and that they continued to live together as man and wife, except occasional separations for purposes of business or pleasure, until the death of said William J. Florence on the 19th day of November, 1891, as alleged.

3. They further admit that the said William J. Florence and the

said Anna Teresa Coveney were professional actors, but they have no information or knowledge of, and are unable to admit, the alleged mutual agreement, set up in the 3rd paragraph of said cross-bill, that the said parties should act together in their professional engagements, and that the profits or income therefrom should become their common property and the property of the survivor of them, or that the said profits or income should be invested in real estate or other securities for their benefit and for the benefit of the survivor, as is alleged, nor have they any information or knowledge which will enable them to admit that the said William J. Florence always attended to the business interests of himself and said complainant and received and took the profits of the said business and
78 invested the same in real estate and securities, as alleged; as to each and every of which allegations they demand strict proof in so far as may be material. These defendants are advised and believe, and therefore aver, that, if any such agreement existed as is set forth in the said 3rd paragraph of said cross-bill, no action can be maintained thereon, nor could the same have any validity, in so far as the real estate involved in this controversy is concerned, unless such agreement were in writing, signed by the said William J. Florence or his duly authorized agent, nor unless the real estate described in said cross-bill was purchased by said Florence with moneys belonging either wholly or in part to said complainant, neither of which facts is claimed in said cross-bill.

4. These defendants believe it to be true that the domicile of the said William J. Florence and of the said complainant was in the city of New York for many years prior to the death of said William J. Florence, and that they were citizens of the United States. The allegations of the 4th paragraph of the cross-bill in regard to the laws of the State of New York, they are advised it is not incumbent upon them to make any answer unto, and that the said laws are wholly without materiality in so far as the real estate of which the said William J. Florence died seized, situated in the District of Columbia, is concerned.

5. The defendants admit that the said William J. Florence and the said complainant have neither children nor descendants, but they have no knowledge of and cannot admit the alleged mutual agreement that each should devise and bequeath to the other all estate, real and personal, which either might die seized and
79 possessed of, or that the alleged last will and testament of William J. Florence was made in pursuance of any such agreement, or that the complainant made her will and testament in favor of said William J. Florence pursuant thereto, and they claim strict proof of each and every of these allegations, if material. They are further advised and believe, and therefore aver, that no such agreement, even if it existed, would have any validity or would be sufficient to sustain any action in regard to real estate, unless the same were in writing, signed by the parties or their duly authorized agents, which they do not understand to be alleged or claimed in and by said cross-bill; nor, as they are advised and believe, and

therefore aver, can the fact that said Florence and the said complainant made mutual wills, if such be the fact, have any bearing or effect upon the title to said real estate, under the facts and circumstances of this case as set forth in said cross-bill.

6. These defendants have no personal knowledge whether the paper referred to in the 6th paragraph of said cross-bill, bearing date the 5th day of May, 1876, was executed according to law by the said William J. Florence as his last will and testament, but require proof thereof if material, and, when so proved, refer to the said will, or a duly certified copy thereof, as the best evidence of its contents. They are advised, however, and therefore aver, that the said will, having been executed many years prior to the acquisition by the said William J. Florence of any real estate in the District of Columbia, is wholly without relevance to said real estate, and that its execution and contents are immaterial.

80 7. They are willing to admit, for the purpose of this suit, that the said will of the said William J. Florence was admitted to probate and record in the county and State of New York.

8. They are further willing to admit that a certified copy of the said will was filed in the orphans' court for the District of Columbia, as alleged in the 8th paragraph of said cross-bill, but are advised and believe, and therefore aver, that such filing thereof was without any materiality.

9. They admit that William J. Florence died seized and possessed of lots twenty-three and twenty-four, in Alley & Paige's subdivision of lots in square ninety-two, in the city of Washington, in the District of Columbia, which real estate, they aver, was acquired by said William J. Florence on the 22nd day of April, 1887.

10. They admit that the said William J. Florence left as his only heirs-at-law the persons named as such heirs-at-law in the said cross-bill, and that the only heirs-at-law of the said William J. Florence at the present time are the persons alleged so to be in the said cross-bill and the bill of revivor filed herein.

11. These defendants have no knowledge whatever, nor any information other than such as is contained in the said cross-bill, that the said William J. Florence ever reiterated or declared the existence of any such agreement as is set up in said cross-bill, or that such agreement, if it existed, included his real estate in said District, and they further show to the court, as they are advised and believe, and

81 therefore aver, if such declarations or reiterations were in fact made the same are wholly incompetent, immaterial, and inadmissible to affect in any way the title to said real estate or its descent to the persons designated by law as the heirs of the said William J. Florence, upon his death intestate as to said property, as they aver the fact to be. They are equally without any information, except that set forth in said cross-bill, as to the delivery by the said William J. Florence to the complainant of any list of the securities and assets of his estate, or if he did deliver such a list, which included said real estate, that he did so with any such purpose of intent as is therein set forth; and they are advised and believe, and therefore aver, that

even if he did deliver such a list and for such a purpose, such act was and is wholly without any legal effect or capacity to affect the devolution of his real property.

And, having fully answered, these defendants pray to be hence dismissed as to said cross-bill with their reasonable costs.

CHARLOTTE L. LISIECKI.
JOHN J. LISIECKI.
MARY JANE CONLIN.
GEORGIANA CONLIN.
FRANCES CECELIA CONLIN.
HARVEY L. MADDOX.
MARY JANE WIARD.
BENJAMIN F. CONLIN.
JOSEPH H. TOOKER.
PETER CONLIN.
WINNIFRED COOKE.
GEORGE J. COOKE.
LUCRETIA A. TOOKER.
VIRGINIA SEGGERMANN.
VICTOR A. SEGGERMANN.

STATE OF NEW YORK,
City of Brooklyn, County of Kings, } *ss:*

I, Benjamin F. Conlin, of the county and State aforesaid, having been duly sworn, say on behalf of myself and my codefend-
82 ants that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein set forth as of my own personal knowlefge are true, and that those set forth on information and belief I believe to be true.

BENJAMIN F. CONLIN.

Subscribed and sworn to before me this 23d day of November, A. D. 1897.

ANDREW F. VAN THUN, JR.,
Commissioner of Deeds, City of Brooklyn.

STATE OF NEW YORK,
County of Kings, } *ss:*

I, Jacob Worth, clerk of the county of Kings and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that Mr. Andrew F. Vanthun, Jr., whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a commissioner of deeds in and for the city of Brooklyn, in said county, dwelling in said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such commissioner and verily believe the signature to the said certificate of proof or acknowledgment is genuine, and that the same is executed and acknowledged
83 according to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 23 day of Nov., 1897.

[SEAL.] JACOB WORTH, *Clerk.*

Replication.

Filed December 15, 1897.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

BENJAMIN F. CONLIN
vs.
ANNA TERESA COVENEY ET AL. } No. 16225. Equity.

The complainant, Anna Teresa Coveney, in the cross-bill filed by her in the above-entitled cause, hereby joins issue with the defendants in said cross-bill.

WILLIAM J. MILLER,
Sol'r for Anna Teresa Coveney, Complainant in Cross-bill.

84 *Testimony on Behalf of Complainant.*

Filed April 16, 1900.

In the Supreme Court of the District of Columbia, Holding Equity Court in said District.

Before Wm. W. Miller, Esq., Commissioner.

BENJAMIN F. CONLIN
vs.
PETER CONLIN and on Cross-bill of Complainant ANNIE Teresa Coveney against Peter Conlin and Others, Defendants in the Same Case. } No. 16225.

TIMES BUILDING, NEW YORK, *April 14th*, 1899.

Met, pursuant to agreement between the solicitors in the above-entitled case, to take the testimony on behalf of complainant Annie Teresa Coveney, in said cross-bill, of the hereinafter-named witnesses. The counsel for the parties have first consented that the testimony taken under the said commission shall be taken down stenographically and reduced to typewriting.

Present: Joseph Fettretch and W. J. Miller for Annie Teresa Coveney; Joseph J. Darlington for defendant.

JOHN SCHENCK WILLIAMSON, a witness for cross-complainant, being duly sworn, deposes and testified as follows:

By Mr. FETTRETCH:

85 Q. What is your full name? A. John Schenck Williamson.

Q. Where do you reside? A. Hotel St. George, Brooklyn.

Q. What is your business? A. An attorney.

Q. Where is your place of business? A. 26 Court street, Brooklyn.

Q. And did you know William J. Florence in his lifetime? A. Yes, sir; I did.

Q. And did you know Mrs. Florence? A. I think I have seen Mrs. Coveney, formerly Mrs. Florence.

Q. Did you know any brothers or sisters of Mrs. Coveney? A. No, not to my knowledge.

Q. Just look at the title in action as it appears in the original bill (handing witness bill) and state if you know any of the parties to the action. A. I don't know them.

Q. In 1876 did you know Richard H. Bowne? A. Very well.

Q. What was his profession? A. A lawyer.

Q. Alone, or associated with any one else? A. Formerly in the firm of Wetmore and Bowne.

Q. How long prior to May 5, 1876, had you known Richard H. Bowne? A. I think I first became acquainted with Mr. Bowne in the summer of 1871.

Q. Were you associated in business with Mr. Bowne? A. I had desk room in his office.

86 Q. Had you seen him write frequently, and had you seen him write his own signature? A. Frequently.

Q. Are you familiar with his signature? A. I think so.

Q. Is Mr. Bowne living or dead? A. He is dead.

Q. Do you remember when he died? A. About the year 1881.

Q. Did you attend his funeral? A. I did.

Q. Did you also, in 1876, know a man by the name of George W. Zener? A. I did.

Q. How long had you known him prior to May 5th, 1876? A. I should say about four or five years.

Q. And were you and he associated in business? A. No, sir.

Q. Was he in the employ of Wetmore and Bowne, or either of them? A. He was their managing clerk.

Q. Did he have his desk or office in the same office as you did? A. He had his desk in the same office and in the same room.

Q. Have you seen him write frequently? A. Frequently.

Q. Very frequently? A. I have.

Q. And have you seen him write his name? A. I have.

87 Q. Are you familiar with his handwriting? A. I am.

Q. Is he living or dead? A. He is dead.

Q. Did you attend his funeral? A. I did; and I know positively he is dead.

Q. Now, I show you a paper dated May 1st, 1876, herewith marked A. T. C. Cross-bill, Exhibit 1, purporting to be the will of William J. Florence, and ask you to look at the signatures "Richard B. Bowne" and "George W. Zener" on the second page of that paper, and state whether the signatures are in the handwriting of the above-named persons respectively. A. I have no hesitation in saying they are.

Q. You have no doubt? A. I have none. I am very familiar with both their handwritings, and have not the slightest doubt.

The above paper is marked "A. T. C. Cross-bill, Exhibit 1, for identification," and filed.

Q. I show you a paper dated May 5, 1876, marked A. T. C. Cross-bill, Exhibit 2, purporting to be the last will and testament of Annie Teresa Florence, and ask you to look upon the second page of that paper and state whether the names Richard W. Bowne and George W. Zener are the genuine handwriting and signatures of the same. A. I have no hesitation in saying that they are.

The above paper is marked "A. T. C. Cross-bill, Exhibit 2, for identification."

88 Cross-examination.

By Mr. DARLINGTON:

Q. Mr. Williamson, this paper about which you have testified, purporting to be the last will and testament of Annie Teresa Florence, is the paper which has marked across its face, "Revoked December 23, 1891—Annie Teresa Florence," is it not? A. Apparently.

Q. That is the paper about which you have testified? A. Yes, sir.

Agreed that the examiner may sign for the witnesses to the will.

JOHN S. WILLIAMSON.

WILLIAM H. DAKIN, a witness for cross-complainant, being duly sworn, testifies as follows:

By Mr. FETTRETCH:

Q. Where is your residence? A. My residence is 241 Ryerson street, Brooklyn.

Q. What is your occupation? A. Manager and assistant manager of the National Park bank.

Q. National Park bank of this city? A. Yes, sir; at 214–'16 Broadway.

Q. And what was your occupation in May, 1876? A. Assistant manager of the safe-deposit vault.

89 Q. And who was associated with you at that time? A. James W. Dominick. Mr. Schultz then was in another department.

Q. But he was in the employ of the bank at that time? A. Yes, sir.

Q. Now, I show you a copy of the bill in this suit and ask you to look at it and see if you know any of the parties to this action. A. I recognize Mrs. Florence, the name by which I knew her at that time.

Q. Other than that, do you know any of the parties to the suit? A. No, sir.

Q. In 1876 did you know William J. Florence? A. Yes, sir.

Q. And had you been acquainted prior to 1876? A. Yes, sir.
Q. Where had you met him? A. In the bank or vault.
Q. Had he a box in the vault? A. Yes, sir.
Q. And you had met him on several occasions? A. Yes, sir.
Q. Did you at that time know Mrs. Florence? A. I saw her come in several times.
Q. Now, I show you a paper purporting to be the will of William J. Florence, deceased, dated May 5th, 1876, and marked "A. T. C. Cross-bill, Exhibit 1, for identification," and ask you to look and see whether the signature William H. Dakin, with address 241 Ryerson street, Brooklyn, is in your handwriting. A. It is in my handwriting and Mr. Schultz as well.
90 Q. That is the signature which appears below yours? A. I simply said that, as there are two signatures together.
Q. Now, I call your attention to the signatures on the first page of the will and ask you whether those or either of them were made in your presence; I refer to the signatures William J. Florence. A. The first signature I know nothing about. The last signature I witnessed.
Q. Was the second signature on the paper made in your presence? A. Yes, sir.
Q. And did Mr. Florence say nothing to you about the signatures? A. Mr. Florence came in with that will signed and asked us to witness the signatures already made. We said to him that the signature must be made in our presence, and he made it there again, as you see.
Q. Now, at the time that he wrote that in your presence what, if anything, did he say after he had written the signature? A. My mind is a blank.
Q. Now, will you read the clause appearing above your signature and see if that refreshes your memory? A. Yes; that is his signature and mine.
Q. Did he request you to sign as a witness? A. He did.
Q. Did he declare it to be his last will and testament? A. He did.
Q. Did he sign it as such? A. Yes, sir.
91 Q. Did you and Mr. Schultz, in his presence and in the presence of each other, sign as witnesses? A. Yes, sir.
Q. Did you observe Mr. Florence at that time as to his condition, bodily and mentally? A. If I did at all, it was to know that his condition was the same as always—no different.
Q. And, so far as you saw and observed, was he in sound mind? A. Yes, sir.
Q. And competent to make a will? A. Yes, sir.
Q. And, in your opinion, was he at that time capable of executing any will? A. Yes, sir.
Q. And capable also of making a deed or contract? A. He was.
Q. Now, I show you a paper marked "A. T. C. Cross-bill, Exhibit 2, for identification," and I call your attention to the signatures of William H. Dakin and Alfred P. Schultz on that paper, which paper

purports to be the will of Annie Teresa Florence, dated May 5, 1876, and ask you whether the signature William H. Dakin is in your handwriting, and whether Mr. Schultz's is in his handwriting. A. Both of them are.

Q. And at that time did you know Mrs. Florence? A. Slightly.

Q. You had seen her several times in the bank? A. Yes, sir.

Q. With him, Mr. Florence? A. Yes.

92 Q. Now, I show you signatures on the first page of the last exhibit, and ask you whether those or either of those signatures were made in your presence. A. The last one was.

Q. Now, state the circumstances of your executing that paper. A. As in the case of the other, the first signature was made elsewhere. We requested that she make the signature in our presence—which she did.

Q. And at that time were both Mr. Schultz and yourself——

Q. The second signature, Annie Teresa Florence, was made in your presence and in his? A. Yes, sir.

Q. And did you and he, in her presence and in the presence of each other, write your names as witnesses on the following page? A. Yes, sir.

Q. Now, at that time, what, if anything, did Mrs. Florence say about this paper? A. I don't remember any conversation, excepting that she requested us to sign in her presence, and we did.

Q. What, if anything, did she say about the other signature? A. Nothing.

Q. Anything that you recall? A. Nothing.

Q. Did she admit it to be her signature? A. Yes, sir.

Q. And then what did you say to her? A. Simply that she must sign her name in our presence.

93 Q. And that is the reason of the second signature? A. Yes, sir.

Q. Look at that paper; does it refresh your memory as to what took place? A. Not the slightest.

Q. Did you read that clause before you signed your names to it? A. We always do.

Q. Was the statement true at the time you signed your names?

Objected to on the ground that the witness has testified that he does not remember anything in regard to this, and his memory is not refreshed by the paper.

Q. At that time and prior to that time had you witnessed wills subscribed? A. Yes, sir.

Q. And were you familiar with the requisite forms in the execution of wills? A. Perfectly.

Q. And with what is called the attestation clause? A. Perfectly.

Q. I find your name signed at the end of the attestation clause; are you prepared to swear that Mrs. Florence declared that to be her last will and testament? A. Yes, sir.

Q. And requested you and Mr. Schultz to sign as witnesses? A. Yes, sir.

Q. And requested you and Mr. Schultz to sign in her presence and in the presence of each other? A. Yes, sir.

94 Q. And did she sign the paper in the presence of yourself and Mr. Schultz? A. Yes, sir.

Q. At that time was Mrs. Florence, now Mrs. Coveney, of sound mind and competent to make a will? A. Yes, sir.

Q. And to execute a valid deed? A. Yes, sir.

Q. And to make a contract? A. Yes, sir.

Q. So far as you could observe at that time, what was her mental condition? A. She was about as I always saw her. I had not seen her very often.

Q. And was she at that time competent to make a valid contract and valid deed? A. Yes, sir.

Q. And, so far as you could observe, was of sound and disposing mind? A. Yes, sir.

Cross-examination.

By Mr. DARLINGTON:

Q. You tell us that, in reading over the attestation clause of the paper which purports to be Mr. Florence's will, it does not refresh your memory as to what occurred on that occasion? A. Yes, sir.

Q. And is that equally true of the attestation clause in the paper purporting to be Mrs. Florence's will? A. Yes, sir.

Counsel for cross-complainant objects on the ground that it is irrelevant, incompetent, and immaterial.

95 Q. Are you quite sure that you read through these attestation clauses when you signed them? A. Yes, sir.

Q. How far apart in point of time were these two actions, the witnessing of Mr. Florence's will and that of his wife? A. I think it was the same day; I think they both bear the same date.

Q. And from the fact that they both bear the same date you take it that it was the same day? A. Yes, sir.

Q. Have you any independent recollection on the subject? A. Not the slightest.

Q. Who was present when you witnessed the paper purporting to be the will of Mr. Florence? A. My assistant, Mr. Schultz; not then my assistant.

Q. Mr. Florence, Mr. Schultz, and yourself were the three persons present? A. Yes sir.

Q. Any one else? A. Not that I remember, except that the lady may have been present herself. Her will was signed the same day. I don't know about that.

Q. You don't remember whether she was present or not? A. That is a blank.

Q. Well, besides her was anybody present except Mr. Florence, Mr. Schultz, and yourself? A. No, sir.

Q. Did you know Mr. Bowne? A. No, sir.

96 Q. You didn't know him? A. No, sir.

Q. Did you know Mr. George W. Zener? A. No, sir.

Q. The attestation clause states that Mr. Bowne, Mr. Schultz, Mr. Zener, and yourself all signed in your presence; was that true? A. No; Mr. Bowne and Mr. Zener were not there.

Q. The reference to this attestation clause does not help you at all as to what occurred there? A. No, sir.

Q. I observe the words "in the presence of each other" are interlined in the attestation clause; can you tell whether those words were there when you signed it? A. I know nothing about that.

Q. Now, the second of these papers, purporting to be the will of Mrs. Florence, also declares in the attestation clause that Mr. Bowne, Mr. Zener, Mr. Schultz, and yourself all signed in each other's presence. That, too, is a mistake, is it? A. Yes, sir.

Q. Now, from the witnessing of wills which you have done, as you have told us, prior to this one, are you able to state, from the fact that your signature is attached to the paper that you have seen today, that the parties declared these papers to be their last will and testament? A. Yes, sir.

Q. And that they did request you and Mr. Schultz to sign? A. Yes, sir.

Q. And that you and Mr. Schultz did sign as witnesses
97 in the presence of these parties and in the presence of each other? A. Yes, sir.

Q. You did not know Mr. Bowne personally, and you are not able to state whether or not he was in fact there? A. I don't think either Mr. Bowne or Mr. Zener was there. I don't think I ever knew or heard of either of them.

WM. H. DAKIN.

JOSEPH S. CASE, a witness for cross-complainant, being duly sworn, testified as follows:

By Mr. FETTRETCH:

Q. What is your occupation? A. Cashier of the Second National Bank of New York.

Q. And how long have you been connected with it? A. Thirty years.

Q. What was your previous connection with the bank? A. I was paying teller from 1868 up to 1885.

Q. Did you know William J. Florence in his lifetime? A. I did.

Q. Do you know any of the parties to this suit, remembering the fact that Mrs. Florence is now known as Mrs. Coveney? A. I know Mrs. Coveney and I know Peter Conlin. Those are the only ones whom I know.

Q. Now, was Mr. William J. Florence a depositor in the Second national bank during the time you were paying teller and otherwise? A. Yes, sir.

98 Q. And were you familiar with his signature? A. I was.

Q. Look at the paper marked "A. T. C. Cross-bill, Exhibit

1," and state whether the signatures of Mr. Florence thereto are in his genuine handwriting? A. I believe they are both of them; he wrote very irregularly.

Q. I show you a paper entitled list of securities and assets in the estate of Mr. Florence, and ask you to look at the handwriting and signature at the bottom of pages 1 and 3 and ask whether the writing and signatures are in the handwriting of Mr. William J. Florence. A. I should say that the handwriting and signatures were both of them the handwriting of Mr. Florence.

Q. And are you familiar with his handwriting? A. I am.

Q. And have seen him write? A. He wrote his signature many times in my presence.

Q. Have you any doubt in regard to his signature here? A. Not the slightest.

Mr. DARLINGTON: I am willing that this paper go into evidence subject to all exceptions as to materiality and competency of the case.

Q. Referring again to paper "A. T. C. Cross-bill, Exhibit 1," have you any doubt that the signatures thereto are in the genuine handwriting of Mr. William J. Florence? A. I have no doubt whatever that those are his signatures.

99 Cross-examination.

By Mr. DARLINGTON:

Q. When you say that the handwriting and signatures on pages 1 and 3 of A. T. C. Exhibit 3 are in the handwriting of Mr. Florence, you don't wish us to understand that all the handwriting there is his? A. Oh, no.

Q. How much on each page is in his handwriting? A. "Corrected list 1891, William J. Florence," on page 1; on page 3, "This is the corrected list of securities I give to my wife, July 1891. William J. Florence."

Q. Do you know in whose handwriting the other parts of the paper are? A. I do not.

J. S. CASE.

JAMES COGAN, witness for cross-complainant, being duly sworn, testified as follows:

By Mr. FETTRETCH:

Q. What is your address? A. 30 Broad street.

Q. And your residence? A. 120 East 11th street, New York.

Q. And your business? A. Law clerk.

Q. What was your occupation or profession in 1876 and prior thereto? A. I was in Mr. Bowne's law office.

100 Q. And where was his office in 1876? A. I think he was still at No. 9 Pine street.

Q. And were you in the employ of Wetmore and Bowne in May, 1876? A. Yes, sir.

Q. And had been prior to that time? A. Yes; for nine years.
Q. And were you familiar with his handwriting? A. Yes; I copied it every day.
Q. And with his signature? A. Yes, sir.
Q. You had seen him write his signature? A. Yes; I had.
Q. Is Mr. Bowne dead or living? A. Dead.
Q. Did you know George Zener? A. Yes, sir; he was in the office.
Q. Was there in 1876? A. Yes, sir.
Q. In May, 1876? A. Yes, sir.
Q. How long had you known him? A. Nine years. J. C.
Q. So that you had known him nine years? A. Yes, sir.
Q. Were you familiar with his handwriting? A. Yes, sir.
Q. Had you seen him write frequently? A. Yes, sir.
Q. And had seen him write his signature? A. Yes, sir.
101 Q. And had seen him write it? A. Yes, sir.
Q. Is he living or dead? A. He is dead.
Q. Did you attend the funeral of Mr. Bowne? A. Yes, sir.
Q. And also of Mr. Zener? A. I did not.
Q. But you know for a fact that he is dead? A. Yes.

Mr. DARLINGTON: It is admitted for the purposes of this case that Mr. Bowne died May 1st, 1881, and that George W. Zener died Nov. 26, 1883; it is also admitted that these are the two persons referred to in this testimony as attesting witnesses to the paper purporting to be the last wills of Mr. and Mrs. Florence.

Q. I show you a paper marked A. T. C. Exhibit 1, and ask you to state whether the signatures Richard W. Bowne and George W. Zener, on the second page of that exhibit, are in the genuine handwriting of Mr. Bowne and Mr. Zener. A. Yes, sir.
Q. Now, referring to A. T. C. Exhibit 2, I ask you whether the signatures on the second page of that paper, Mr. Bowne's and Mr. Zener's, are in the genuine handwriting of those persons. A. They are, yes.
Q. In whose handwriting are those two exhibits, Exhibit 1 and 2, in the body of the instrument? A. In the handwriting of George W. Zener.
Q. And the attestation clause in each case? A. George W. Zener.
102 Q. In A. T. C. Cross-bill, Exhibit 1, I observe an interlineation at the top of page 2, in the attestation clause. In whose handwriting is that? A. In George W. Zener's handwriting.
Q. I show you a paper and ask you to tell us in whose handwriting the body of the paper is and in whose handwriting are the words, "Rec'd pay't, Wetmore & Bowne, October 12, 1877." A. The words are in the handwriting of Mr. Bowne; the remainder is in George W. Zener's handwriting; everything but "Received payment, Wetmore & Bowne, October 12, 1877," is in Mr. Zener's handwriting.

Cross-examination.

By Mr. DARLINGTON:

Q. In this last exhibit, about which you have testified, I observe this item: "Drawing deeds from you to Mr. Cogan and back to Mr. Florence to vest title." Are you the Mr. Cogan who is referred to? A. Yes, sir.

Q. What was the transaction?

Mr. FETTRETCH: Objected to, as that paper was only offered for the sake of the item about the wills of Mr. and Mrs. Florence.

A. It was used by Mr. Bowne as a medium to transfer from husband to wife.

Q. Drawing deeds from you means, does it not, drawing deeds from Mr. Florence to yourself, and your conveyance of them to Mrs. Florence?

Same objection as before.

A. No answer.

JAMES COGAN.

103 ALFRED P. SCHULTZ, a witness for cross-complainant, being sworn, testifies as follows:

By Mr. FETTRETCH:

Q. What is your full name? A. Alfred P. Schultz.
Q. Where do you reside? A. 414 West 147th street, New York.
Q. Where is your place of business? A. National Park bank.
Q. And were you employed there in 1876? A. Yes, sir.
Q. And how long prior to that? A. About six years, I think in 1869.
Q. And have you been all the time in that bank? A. Yes, sir.
Q. Do you know Mr. William H. Dakin? A. Yes, sir.
Q. He is still in the employ of the bank—or was in 1876? A. Yes, sir.
Q. You were in May, 1876? A. Yes.
Q. Did you know Mr. William J. Florence in his lifetime? A. Yes, sir, in a business way.
Q. Had you seen him in the bank? A. Yes, sir.
Q. Do you know any of the parties to this action? A. Yes, sir; I knew Mrs. Florence at that time.
Q. Now Mrs. Coveney? A. Yes, sir.
104 Q. Other than that, do you know any of the parties? A. No, sir. I may have known Mr. Peter Conlin by sight.
Q. Other than that, you know none of the parties to this suit? A. No, sir.
Q. I show you a paper marked A. T. C. Cross-bill, Exhibit 1, purporting to be the will of William J. Florence, deceased, and dated May 5th, 1876, and ask you to state whether the signature, Alfred P. Schultz, is in your handwriting. A. It is.

Q. Do you know the signature and handwriting of Mr. Dakin? A. Yes, sir.

Q. And have you seen him write frequently? A. Every day.

Q. And is that his signature? A. Yes, sir; no doubt about that.

Q. Do you remember the occurrences of your signing your name to that paper? A. I do not, sir.

Q. You knew Mr. Florence, Mr. William J. Florence? A. Yes, sir.

Q. Had you prior to May 5th, 1876, been a subscribing witness to wills? A. Yes, sir.

Q. Frequently? A. Quite frequently.

Q. Were you familiar with the requisites to a will at that time? A. Yes, sir.

105 Q. Now, I call your attention again to the will and ask you to state whether or not Mr. Florence signed that paper in your presence. A. I believe he did, because I never put my signature to a will without expecting the testator and the other witnesses to sign in my presence.

Q. And did the witnesses, yourself and Mr. Dakin, sign your names as witnesses in the presence of Mr. Florence? A. Yes, sir.

Q. Of that you have no doubt? A. No doubt; I don't remember the occasion, but I know I would not.

Q. Did Mr. Florence declare that paper to be his last will and testament? A. I never subscribe to a will without either the testator and the other subscribing witnesses signing in my presence.

Q. Did he declare the paper signed by him as his will, in your presence, to be his last will and testament? A. That I can't swear to, but I always understand that to be so.

Q. And did you ever subscribe to any will, or purporting to be a will, when the testator did not make such a statement? A. Never; and we always asked the testator to make such a statement.

Q. Did Mr. Florence bring this will in person? A. Yes, sir.

Q. Do you remember if Mrs. Florence was there at that time? A. No, sir.

106 Q. You observe there are two signatures? A. Yes, sir.

Q. And which signature was made in your presence? A. The last one.

Q. When he made that signature in your presence, did he declare that to be his last will?

Objected to on the ground that the witness has already stated several times that he does not recollect about it, but he believes it from the presence of his own signature.

A. I only assume that he did because of my knowledge of what was to be done and what always had been done in such matters.

Q. Have you ever subscribed a paper purporting to be a will when the testator has not declared it to be his last will and testament? A. No, sir.

Q. Now, at the time this paper was executed was Mr. Florence in good health?

Objected to for the same reason.

Q. What was his condition so far as you observed?

Objection repeated; if the witness does not remember the occasion, it is impossible to remember the other circumstances.

Q. I refer to the time when you and Mr. Dakin subscribed your names to A. T. C. Cross-bill, Exhibit 1. A. Well, I never saw him, except when I thought him in good health. I did not see him ever otherwise.

Q. I refer to the time when this paper was executed. A. So far as I observed, he was in good health, because I never saw him otherwise.

107

Q. How as to his apparent mental condition? A. My remembrance is that he was in sound condition.

Q. And was he capable at the time you signed that paper to make a valid deed or contract? A. Yes, sir; because I never saw him otherwise than in good mental and physical health.

Q. I call your attention to a paper marked A. T. C. Cross-bill, Exhibit 2, purporting to be the will of Annie Teresa Florence, dated May 5th, 1896, and ask you to say whether the signature A. P. Schultz on the second page of that paper is your handwriting. A. Yes, sir.

Q. And bears the signature of William H. Dakin? And is that in his handwriting? A. Yes, sir.

Q. That is his genuine signature? A. Yes, sir.

Q. I show you a paper now, A. T. C. Cross-bill, Exhibit 2, and ask you whether the signatures Annie Teresa Florence, or either of them, were made in your presence. A. To the best of my knowledge and belief, they were.

Q. And in the presence of Mr. Dakin? A. Yes, sir.

Q. And both of her signatures were in your presence? A. Yes, sir. I never remember of signing a will other than in the presence of the testator or the subscribing witnesses.

Q. And after the paper had been declared to be the last will and testament? A. Yes, sir.

Q. And if you put your name to the will, it is at the request of the testator? A. Yes, sir.

108

Q. Now, at the time when this paper, Exhibit 2, purports to have been signed by you as a witness, what was the condition of Mrs. Coveney—then Mrs. Florence—so far as you observed? A. I have no recollection of it except that I always saw her in usual good health.

Q. And was she, at the time you signed that paper, capable of executing a valid deed or contract? A. So far as I could judge—yes, sir.

Q. To the best of your knowledge, she was capable of making a valid contract or deed? A. Yes, sir; because I only saw her in good health.

Q. Bodily and mentally? A. Yes, sir.

Cross-examination.

By Mr. DARLINGTON:

Q. How long have you known Mrs. Coveney? A. Well, I knew the lady—I can't say; a few years prior, about the same time I knew Mr. Florence; some time during the time they had a safe in the vault.

Q. Can you approximate the time? A. Three years or more.

Q. Three years from what time? A. Well, go up to within about, I should think—about 10 years ago.

Q. You had known her for 3 years prior to ten years ago? A. Yes, sir.

Q. So you first knew her about 15 years ago? A. I think
109 so; maybe longer; I can't speak surely, but I knew her some years.

Q. Have you ever seen her prior to May 5, 1876? A. I cannot swear.

Q. Did you know No. 9 Pine street, New York city? A. I know the location; yes, sir.

Q. How near is it to the Park national bank? A. About 4 or 5 blocks.

Q. Was the location of the Park national bank in 1876 the same as now? A. Yes, sir.

Q. Did you know Richard H. Bowne? A. I don't remember the firm individually; I had some business for myself, but I never knew the members of the firm. I think I was introduced to one of the members of the firm by Mr. Jackson S. Schultz.

Q. So far as your recollection is, did you ever meet Richard H. Bowne? A. No, sir; I can't say that I did.

Q. Did you ever, in your recollection, meet George W. Zener, his clerk? A. I can't remember.

Q. Mr. Dakin has testified that neither Mr. Bowne or Mr. Zener was present when you and Mr. Dakin witnessed the execution of the paper purporting to be Mr. William J. Florence's will? A. It may have been so.

Q. You have no recollection on that subject? A. No, sir.

By Mr. FETTRETCH: I call your attention to the fact that this paper, A. C. T. Cross-bill, Exhibit 1, is dated May 5th, 1876, and ask you if you had known Mrs. Florence 13 years. Is that correct?
110 A. No; I don't think I said I had known her for 13 years, but for some years, and for 3 years prior to ten years ago.

Q. Well, this paper, A. T. C. Cross-bill, Exhibit 2, purports to have been dated May 5th, 1876. Have you any explanation to make as to your knowing her 13 years? A. I don't know how long I have know- the lady, but I am sure I have known her several years and had known her.

Q. Assuming that the date May, 1876, was the date that the paper was executed, how long had you known her prior to that? A. I had known her a few years.

Q. How do you know, Mr. Schultz, that you had ever known Mrs.

Coveney, that you had ever seen her before that day? A. She was introduced to me.

Q. But may she not have been introduced on that day? A. I had already known her when that will was executed. The safe had been listed in Mr. and Mrs. Florence'- names jointly.

Q. Was it before or after this will was executed? A. Oh, before.

Q. What enables you to remember that? A. Because we had known Mrs. Florence, I think, and were well acquainted with the parties at that time.

Q. But you have told us that you have no recollection of the execution of that paper? A. I know it; but we had known Mr. and Mrs. Florence before that time, because we were well enough acquainted to execute that paper.

ALFRED P. SCHULTZ.

111 AUGUSTUS L. HAYES, a witness for cross-complainant, being duly sworn, testified as follows:

By Mr. FETTRETCH:

Q. Where is your place of business? A. At 11 Pine street.

Q. And where is your residence? A. 11 West 103rd street, New York.

Q. What is your occupation at the present time? A. I have no particular occupation at the present time.

Q. What was your occupation in 1876 and prior to that time? A. What time?

Q. Prior to June 1st, 1876? A. I was in an office.

Q. Whose office? A. I think in July, 1876, I went into Mr. Wetmore's office.

Q. Did you know Richard H. Bowne? A. Yes, sir.

Q. How long prior to June 1st, 1876? A. I should say about a year or a little more.

Q. And how long after that? A. To the time of his death.

Q. And had you seen him write his signature? A. Yes, sir.

Q. Are you sure you had seen him write his signature? A. Yes, sir.

Q. Are you familiar with his handwriting and his signature? A. Yes, sir.

112 Q. Look at the paper marked A. T. C. Cross-bill, Exhibit 1, purporting to be the will of William J. Florence, dated May 5th, 1876, and state whether the handwriting of Richard H. Bowne, on the second page of that paper, is in the genuine handwriting of Mr. Bowne. A. It is.

Q. Have you any doubt about it? A. No doubt about it.

Q. Did you know George W. Zener in his lifetime? A. Yes, sir.

Q. How long prior to his death? A. I knew him about the same time.

Q. About the same period? A. Yes, sir; when I worked for a Mr. McCahill, I think, in Mr. Wetmore and Bowne's office.

Q. They occupied the same suite? A. Yes, sir.

Q. Had you seen Mr. Zener write? A. Yes, sir.
Q. So you were familiar with his handwriting? A. Yes, sir.
Q. Now, look at the paper marked A. T. C. Cross-bill, Exhibit 1, and state whether it is the genuine signature of Mr. Zener on page 2. A. (Examining paper.) Yes, sir.

A. T. C. Cross-bill, Exhibit 1, is now offered in evidence, purporting to be the will of William J. Florence.

Q. Now, I show you a paper, A. T. C. Cross-bill, Exhibit 2, and ask you whether the signature of Richard H. Bowne, on the second page, is in the genuine handwriting of Mr. Bowne? A. Yes, sir.
113 Q. I ask you the same question in regard to the signature of George W. Zener. A. Yes, sir.

A. L. HAYES.

Mr. DARLINGTON: The questions as to materiality of Exhibit 1 and its competency upon any of the issues in this case are hereby reserved.
It is admitted that the witnesses who have been called and who have testified this morning are upwards of 21 years of age.
Mr. Fettretch offered in evidence an exemplified copy of the will of William J. Florence, deceased, and of the probate thereof, and of the proceedings in said probate in the granting of the same, and being an exemplified copy of the record, and marked "Exhibit A. T. C. No. 1," annexed to the answer to the original bill to this suit.
Mr. DARLINGTON: I object on the ground that it is shown by the pleadings that the property in controversy was acquired by Mr. Florence long subsequent to the will, and the latter is, therefore, without any relevancy to the issues in this case.

JOSEPHINE FLORENCE SISSON, a witness called on behalf of the cross-complainant, being duly sworn, testified as follows:

Mr. DARLINGTON: I request that all the witnesses that are to be examined as to any communication with respect to Mr. Florence or any declaration made by him shall retire and be examined separately from each other. To which counsel for Mrs. Coveney
114 objected, and thereupon the witnesses returned.

By Mr. FETTRETCH:

Q. Where do you reside? A. No. 180 West 41st St., New York.
Q. Did you know William J. Florence in his lifetime? A. Yes, sir, and looked upon him as my father from the time I was 9 years old.
Q. What relation are you to the defendant Annie Teresa Florence? A. She is my mother.
Q. Were you in the habit of frequently visiting your mother and Mr. Florence from the year 1870 to 1880, and also often during those years? A. Almost daily.

Q. Were you on terms of intimacy with your mother and Mr Florence during that period? A. Always the best friends.

Q. What was the occupation of Mr. Florence, if you know? A. An actor.

Q. And your mother? A. An actress.

Q. Do you know if they were in the habit of acting together? A. I never knew them to act apart, excepting the two years he was with Mr. Jefferson.

Q. Did you ever hear any conversation between Mr. and Mrs. Florence in regard to wills?

Question objected to on the grounds that any answer that
115 may be given to it in regard to the title of real estate, which is the only subject of controversy in this suit, cannot be effected by any oral communication.

A. Yes, sir.

Q. State, as near as you can, about when and where you heard those conversations. A. It was during the month of May. I had called at the 5th Avenue hotel to see my mother, and had expected to go out shopping with her.

Q. What year was that? A. I know it was in the month of May, but I can't tell the year. I went in the parlor with Christine Vitala.

Q. Did your mother and Mr. Florence come there on that occasion? A. Yes, sir. They returned and the first words my father said to me on entering the parlor was, "Hello, we have both been downtown and made our wills. I have left everything I own to your mama."

Q. What else was said by either of them? A. Mama made an answer and said, "Yes, and when I die I have left everything to your pa."

Q. Mr. Florence died in what year, if you remember? A. I don't know the year, Mr. Fettretch, but it is about 8 years this November, the 19th.

Q. About how many years before that was it, if you can recollect, that you had this conversation? A. A long time.

Q. Where did it take place? A. In the 5th Avenue hotel, in the parlor.

Q. Where you were living at that time? A. Yes, sir.

116 Q. Did you, on any other occasion, hear any talk upon the same subject?

It is stipulated between counsel that all testimony as to conversations by and with Mr. Florence is taken subject to the objection that they are inadmissible to affect in any manner the title to real estate or any issue in this case without being repeated every time.

A. Not between them.

Q. Did you have any conversation with Mr. Florence, or hear him say anything on any other occasion? A. Yes, sir; the week before he died.

Q. Where was that? A. At the 5th Avenue hotel, the Sunday before he left for Philadelphia.

Q. What did he say? A. He sent for me to come there to the hotel to eat breakfast with him. He told me he felt very badly; that he had caught a bad cold in Boston. He looked around the rooms and said, "These rooms; these rooms." I said, "Why do you talk like that?" He said, "I feel badly, but if anything happens to me, Joe, your mother will have everything and be well provided for."

Mr. DARLINGTON: I move to strike out the answer as irresponsive, and will move at the hearing to suppress it without being read.

Cross-examination.

By Mr. DARLINGTON:

—. Are you the same party as has been designated as Josephine Florence Sisson? A. Yes, sir.

Q. Your name is Mrs. Shepherd, is it not? A. Yes, sir; my stage name; I married Mr. Sisson.

117 Q. And before your marriage? A. It was Shepherd.

Q. Your maiden name? A. No; I married twice.

Q. And your maiden name was what? A. Josephine Littell—my own father's name.

Q. Your mother, then, has been married twice? A. Certainly.

Q. What age were you when you first knew Mr. Florence? A. About 9 years old when my own father died.

Q. When did your mother marry Mr. Florence? A. Well, that I can't tell, but from what I have always been made to understand I don't think my mother was married more than two years before I went to her.

Q. She was married, then, to Mr. Florence before the death of your own father? A. Yes, sir.

Q. Where were your father and mother living when you first came to them? A. In Chicago, at a hotel. I don't recall the name of the hotel.

Q. And from the time that you came to them, when about nine years of age, you lived with them, did you? A. More or less, excepting when sent to boarding school.

Q. Since that time, Mrs. Sisson, who was it that provided for your education and maintenance? A. My mother and father jointly.

Q. Were you at any time in receipt of an allowance?

118 A. Not until my mother went to Europe; then I went to my father, stating that I had no engagement and no means. He procured me an engagement and helped me by giving me money to get stage dresses.

Q. You were not living with him then? A. No, sir; I was living at the Belvedere hotel, Fourth avenue and Eighteenth street.

Q. Did you ever make your home with them? A. Never.

Q. Before your first marriage did you not make your home with them? A. Before my first marriage, certainly.

Q. And then your home was with them? A. With them unless at boarding school.

Q. When were you married? A. When I was about eighteen years old. I was married just before the war between the States occurred. I do not remember just the date.

Q. My question a moment ago was, was there no time when Mr. Florence made you a weekly allowance?

Mr. FETTRETCH: I object to the question as being irrelevant, incompetent, and immaterial.

A. He only allowed me for a few weeks, until I could get my dresses for my part and get on my feet for my engagement.

Q. Do you remember the amount? A. $25 a week.

Q. These dresses you speak of were stage dresses? A. Yes; stage dresses to start out in my engagement with Mr. Frohman's company.

Q. Where was your mother at this time? A. In Europe.

Q. Do you know what she was doing there? A. Mr. Florence had situated her beautifully at Morley's hotel while he went
119 on a tour with Jefferson.

Q. It was at this time that he made this advance to you? A. Yes; at this time; and it was the first and only time I ever asked him to aid me.

Q. This, then, was during the last two or three years of his life? A. The last years of his life.

Q. Had not your mother been in Europe before that? A. Oh, yes.

Q. Yes, but before this time; had she not spent a year or two in Europe? A. I believe she had spent a year or two when she was ill.

Q. What did your father do during the time she was away? A. I never saw him—travelling, I believe.

Q. Following his vocation? A. Yes, sir.

Q. About when? A. I can't really tell you. I know mother was ill at the time.

Q. Can you approximate the time in any way? A. No, I cannot. It was at a critical time in my mother's life.

Q. Ten or twenty years ago? A. I can't tell you, as I said. She went over there and remained in a convent.

Redirect examination.

By Mr. FETTRETCH:

Q. Before this interview between Mr. and Mrs. Florence and yourself at the Fifth Avenue hotel, about which you have testi-
120 fied, that Mr. and Mrs. Florence made a statement in regard to what they had been doing downtown—did you ever hear them talk before that time on the subject of wills? A. Never before. As there had been so much trouble concerning Mr. Barney Williams, my father went down to make his will.

JOSEPHINE SHEPHERD SISSON.

CHRISTINE NERINI, a witness for cross-complainant, being duly sworn, testifies as follows:

By Mr. FETTRETCH:

Q. Where do you reside? A. 133 Lexington avenue.
Q. Are you a married woman? A. Yes, sir.
Q. With whom did you reside up to the time of your marriage? A. With Mr. and Mrs. W. J. Florence.
Q. And you were married when? A. In 1883—May.
Q. How long had you lived with Mr. and Mrs. Florence up to the time of your marriage? A. Eleven years.
Q. And you went to live with them in what year? A. In 1871.
Q. Did you live with them continuously down to the time of your marriage? A. Continuously.
121 Q. Do you know the parties to this suit other than Mrs. Florence? A. I know Mrs. Florence, now Mrs. Coveney. I know Mr. Peter Conlin, Mr. Benjamin Conlin, Mr. Tooker, and Mrs. Wiard.
Q. Do you remember any occasion when you were living with Mr. and Mrs. Florence that they lived at the Fifth Avenue hotel? A. Yes, sir.
Q. What were your duties in their family? A. As a maid.
Q. To Mrs. Florence? A. To both.
Q. To both. Then you were not present when they were present together? A. Always.
Q. Do you remember any conversation or talk or statement by Mr. and Mrs. Florence in regard to wills?

It is stipulated between the counsel that the objections heretofore made to this line of questioning shall apply to all questions of this character.

A. Yes; oh, yes.
Q. Now, state what conversation or conversations you heard between Mr. and Mrs. Florence, and what statements you heard by Mr. Florence in regard to wills. A. He always said to her, Don't worry, it will always be well with you. The day he went to make a will, when he came back he said that everything had been fixed and arranged.
Q. What else, if anything? A. Whenever they had any trouble he always said, "Well, it will be well for you. I don't think
122 I shall live to be very old and you have helped to earn this money with me."
Q. Do you remember the time that they came back from the lawyer's office? A. Yes, I remember.
Q. Who was present? A. Mrs. Shepherd.
Q. Now Mrs. Sisson? A. Yes, sir.
Q. Was she present when Mr. and Mrs. Florence said anything about the will? A. I can't say.
Q. Was she there when they came back? A. Yes; she was waiting that day.

Q. Was she waiting so she could hear? A. Yes; she was waiting there.

Q. Have you stated all that you heard them say about wills? A. All about wills.

Q. Did you ever hear Mr. and Mrs. Florence say that whatever either of them had was to go to the other when either died? A. Yes, sir.

Q. What did you hear them say? A. It was a great many years ago, but they said whichever should die first should leave it to the other.

Q. That is, to the one surviving? A. Yes, sir; he said, "Don't worry." He said, "Don't worry, for it shall be all right."

Cross-examination.

By Mr. DARLINGTON:

123 Q. How long ago was it that this conversation took place, when they came back from making the wills? A. In 1876. They always do this kind of business after the season was over, when they came to New York.

Q. It was in May, 1876, was it? A. Yes, sir.

Q. What enables you to remember the year? A. Well, because, you see, it was an important deal.

Q. Did she ever tell you it was in 1876? A. Yes, sir.

Q. But did they speak to you of the date always? A. No. It was in May.

Q. You have told us it was in May, 1876. Now, I ask you what enables you to place the date so truly? A. It is an important event and I take interest enough in them to remember the facts, and I do think I remember right.

Q. Where was Mrs. Shepherd living then? A. With her husband.

Q. Was she married in 1876? A. Yes, sir.

Q. How long before that had it been that she was at the rooms of Mr. and Mrs. Florence? A. Oh, she came very often; so often I can't remember.

Q. How long after that day before she next came, do you remember? A. Can't remember; it is impossible.

Q. What makes you recall that she was there waiting that day? A. Because we were waiting very anxiously for them.

124 Q. What were you anxious about? A. Not on my part, but, as I told you before, I was anxious they should have everything right.

Q. Was there any difficulty at all in the way that should make people anxious? A. Not at all.

Q. Why were you anxious? A. That they go down and attend to this very serious business.

Q. When did you last talk to Mrs. Coveney about this matter, and where? A. Here in this office.

Q. When was that? A. I don't remember.

Q. How did you happen to meet her here? A. She sent for me.
Q. To come down here? A. I was sent for by the lawyer.
Q. And you came down and had a talk here? A. Yes, sir.
Q. Before that, when was the last time that you had a talk about this matter? A. Never—only here.
Q. Did she ever ask you to testify for her in this case? A. She asked me to tell what I know.
Q. Where was she? A. She had to let me know to come here.
Q. Where did she see you when she let you know that you were to come here? A. She wrote me.
Q. She didn't see you at all? A. She only wrote me to come.

Q. What did she say she would do for you? A. I have
125 no interest in this case. I would like to have her get it.

Q. Did she never say to you that she would do anything for you? A. No.
Q. Did she say anything about your going to Europe? A. I said to madame that I would like to go to Europe, but I planned my trip before this.
Q. Now, you have to tell the whole truth. What was said about the trip to Europe? A. I could not tell. I think she told me the same thing that Mr. Florence told me before he died—"How would you like to go again across the water?"
Q. What was said about your expenses for your trip to Europe? A. Nothing at all. I had to pay my own expenses; nothing at all.
Q. Where did that conversation about expenses take place? A. Now, right today; that is the first time.
Q. Did you ever have any talk with Mrs. Coveney about $500? A. Never did; if she intends to give me something, that is all right.
Q. Do you know Mr. W. I. Elliott? A. Yes.
Q. When did you last see him? A. I can't remember.

Q. It has not been very long? A. I can't remember. I
126 have so many things in my mind that I can't remember.

Q. Tell us as near as you can when you last saw Mr. Elliott. A. I can't tell.
Q. Has it been two weeks? A. I don't remember.
Q. Did you ever talk with him about this case? A. No.
Q. You didn't tell him you were to be a witness? A. No.
Q. Well, if he knew you were to be a witness two weeks ago, how did he know it? A. I don't know.
Q. Did you ever say anything to him about your wanting to take a trip to Europe? A. No, sir.
Q. If he knew that two weeks ago, how did he know? A. I can't tell you.
Q. Didn't Mr. Elliott call on you at your house the latter part of March or the 1st of April? A. He called many years ago about Effie Esler.
Q. My question is, didn't he see you at your house the last week in March in this year, and probably the last day in March? A. I don't remember.
Q. At your house in Lexington avenue? A. I don't remember.

Q. Didn't you tell him then that you were going to meet Mrs. Florence at her lawyer's? A. It is all new to me.

Q. Didn't tell him so? A. No.

127 Q. You were down here about two weeks ago, were you not? A. No; I did not come.

Q. Were you notified to come down here a couple of weeks ago? A. Not here.

Q. Where to come? A. I was notified to go to madame's house.

Q. How long ago—a couple of weeks? A. Yes.

Q. And then you heard not to come? A. Yes, sir.

Q. And then you didn't come? A. No.

Q. Do you know how Mr. Elliott knew about this? A. He might have met my husband—that I do not know.

Q. Didn't you tell Mr. Elliott at your house the latter part of March in this year that Mrs. Florence told you if she gained her suit that she would give you $500? A. I didn't see Mr. Elliott.

Q. You didn't tell him anything of that sort? A. No.

Q. Didn't you tell Mr. Elliott on that occasion that you had told Mrs. Coveney that you didn't want $500? A. I told my husband that.

Q. But that you would like enough to take you to Europe? A. I said that to my husband.

Q. You don't know how Mr. Elliott knew that? A. No; I don't know.

128 Redirect examination.

By Mr. FETTRETCH:

Q. Have you had any conversation with him during the last two or three weeks? A. I do not remember seeing Mr. Elliott.

Q. You say that you talked with Mrs. Coveney today about it. Who was present? A. Only we two.

Q. Was it when you had been requested to leave this room by Mr. Darlington while the examination was being taken? A. Yes, sir.

CHRISTINA NERINI.

ANNIE TERESA COVENEY, called in her own behalf, was sworn, and testified as follows:

By Mr. FETTRETCH:

Q. Your full name? A. Annite Teresa Coveney.

Q. Where do you reside at the present time? A. No. 200 111th street, West Seventh avenue.

Q. You know the parties to this suit? A. Yes, sir.

Q. You knew William J. Florence in his lifetime? A. Why, yes, sir; of course.

Q. He was your husband? A. 38 years.

Q. And he died when? A. November 19, 1891—eight years ago.

129 Q. When were you and he married? A. In the fifties, I think.

Q. And what was his profession? A. He was a great actor.

Q. And yours? A. An actress.

Q. And were you both in that profession at the time of your marriage? A. Yes, sir.

Q. And did you continue in that profession? A. Yes, sir.

Q. And did you act together after your marriage? A. Yes, sir.

Q. Then you and he were acting together after you were married? A. Yes, sir.

Q. And you continued acting together until when? A. Until he joined Mr. Jefferson.

Q. Were the two seasons before his death the ones with Mr. Jefferson? A. Those were the two seasons, the ones before his death.

Q. In your answer and the cross-bill here you said that your marriage to Mr. Florence occurred on January 1st, 1853? A. That is right; yes.

Q. Now, was there any agreement or an arrangement between yourself and your husband after your marriage in regard to the earnings of yourself and husband as actor and actress?

Mr. DARLINGTON: I object to that question on the ground,
130 first, that the witness is incompetent to testify as to transactions between herself and husband; and, secondly, because testimony of this description is inadmissible and incompetent to the issues in this case.

A. We shared alike. We were joint partners in business.

Q. Was there anything said between you and Mr. Florence as to any investment of moneys earned by you and him; and, if so, what was it?

Objected to on the additional ground that it is incompetent to affect the title by testimony as to oral communications; if the agreement were in writing it should be produced.

A. He never bought any property or real estate without consulting me.

Q. (Question repeated.)

Objection repeated and the ground added that there are no allegations in the pleadings upon which testimony of the kind now said to be adduced can be based.

A. Yes, sir.

Q. What was it?

It is agreed between counsel that the objections before made shall apply to similar questions, thus not necessarily encumbering the record.

A. Why, that in case he should invest money it should be jointly invested. In our conversation it was said that whatever was invested we should share jointly.

Q. Now, do you remember an occasion when Mr. Florence and yourself went to any lawyer's office in the matter of making wills?
A. Yes, sir.

131 Q. To whose office did you go? A. To Richard H. Bowne's office.

Q. Before going down to Mr. Bowne's office, did you and Mr. Florence have any conversations in regard to the making of wills? A. Yes; at the Fifth Avenue hotel.

Same objection repeated.

Q. What conversations? A. That in case of his death he was to leave me everything; in case of my death I was to leave him everything.

Q. Now, was that at or before the wills were executed? A. Before.

Q. Do you recall any circumstances? A. Yes; something was said about Mr. Williams' death.

Q. Was that talked of between Mr. Florence and yourself? A. Yes, sir.

Q. State what was said. A. We had a conversation about Barney Williams' death and I said it would be well to make our wills, and he said that we should do it, and I said, "And you will leave me everything and I you everything."

Q. Did you and he, after that conversation, go down to Mr. Bowne's office? A. Yes, sir.

Q. And were wills drawn by Mr. Bowne when you and he went there? A. Yes, sir.

132 Q. I show you A. T. C. Cross-bill, Exhibit 1, and A. T. C. Cross-bill, Exhibit 2, and ask you whether these two papers were prepared by Mr. Bowne at that time as the wills of yourself and husband. A. They were.

Q. And were these two exhibits executed by yourself and your husband, respectively, at that time? A. Yes, sir.

Q. And witnessed by Mr. Bowne and Mr. Zener at Mr. Bowne's office? A. Yes, sir.

Q. After they had been executed at Mr. Bowne's office where did you go? A. We went to luncheon and from there we went to the Park bank.

Q. Do you remember that after you got to the bank your asking Mr. Dakin and Mr. Schultz to witness the wills? A. Yes, sir.

Q. And did you and Mr. Florence there execute the wills? A. Yes, sir.

Q. And Mr. Dakin and Mr. Schultz became witness- there? A. Yes, sir.

Q. Were the wills left there by yourself and Mr. Florence at that time? A. Yes, sir.

Q. Were both of these exhibits, Exhibit 1 and Exhibit 2, executed at the same time? A. At the same time in the Park bank.

133 Q. Witnessed on the same day at the office of Mr. Bowne?
Q. Yes, sir.

Q. The two executions of these papers were on the same dates? A. On the same dates.

Q. Now, I show you said Exhibit 2, and ask you to state in whose handwriting the words on the face of that paper, "Revoked Dec. 31, 1891. Annie Teresa Florence," are written. A. In mine.

Q. That was after your husband's death? A. Yes, sir.

Q. Up to the time of your husband's death and thereafter, until the 23rd of December, 1891, that will remained in full force, did it not? A. Yes, sir.

A. T. C. Cross-bill, Exhibit 2, for identification, is offered in evidence and marked A. T. C. Cross-bill, Exhibit 2.

This paper is admitted over Mr. Darlington's objection on the ground of its incompetency, immateriality, and want of any legal bearing on the case.

Q. Referring to said Exhibits 1 and 2, were they executed by your husband and yourself as mutual wills? A. Yes; as mutual wills.

Q. Now, I show you paper "A. T. C. Cross-bill, Exhibit 3," and ask if you ever saw that paper before. A. Yes, sir.

Q. And from whom did you receive it?

Objection as to the competency of the witness to testify to anything between herself and husband.

134 Q. In whose handwriting are the words above the lower double lines on pages 1 and 3? A. Why, in Mr. Florence's.

Same objection as that made to the former exhibits.

Cross-examination.

By Mr. DARLINGTON:

Q. Your present name is Mrs. Coveney? A. Yes, sir.

Q. When were you married to Mr. Coveney? A. About three years ago—about a year after Mr. Florence died.

Q. Was it in October, 1892? A. No—the 10th of January, 1893.

Q. And your marriage to Mr. Florence was in January, 1853? A. Yes, sir.

Q. You had been an actress before your marriage to him? A. Yes, sir.

Q. For how long? A. Oh, for a little time—a few years.

Q. Had you ever been a manager of a theatrical venture before your marriage to Mr. Florence? A. No, sir.

Q. You had simply been employed as a member of a company? A. Yes, sir.

Q. What was the largest salary you had received or been paid before your marriage to Mr. Florence, and who paid it? A.

135 Mr. John Brougham, $100 a week.

Q. What parts did you perform? A. Oh, such as fairies and dances and very light business. I was young and I think I played nothing heavy.

Q. Can you recall any of the principal characters? A. Yes; such plays as Mountain Sylph, Spirit of the Fountain, and Nan, the Good for Nothing.

Q. How long did you serve with Mr. Brougham? A. I think I was with him about two seasons.

Q. With what other managers? A. Mr. Lester Wallack's father. I was under him for a year and I received from him a very good salary.

Q. What salary did Mr. Wallack give you? A. $125 a week.

Q. What was the length of your season with these gentlemen? A. Two years with one and one with the other.

Q. What parts of the season? A. Oh, up to June in each season.

Q. Is your recollection clear that you received more than $18 a week? A. It was $100 and $125, I told you.

Q. These were the three years immediately preceding your marriage to Mr. Florence? A. Yes, sir.

Q. When were you married to Mr. Littell? A. I surely cannot tell the date. I was not seventeen.

Objected to as irrelevant, incompetent, and immaterial, and it is moved to strike it out as being irresponsive.

136 Q. You can't remember when you were married to your first husband?

Same objection.

A. No, sir.

Q. Can you remember how long you were married?

Mr. DARLINGTON: It is understood that the objection applies to all these questions.

Q. How long were you married to him? A. About three years; not quite three—a little less than that.

Q. What property did you own at the time of your marriage to Mr. Florence? A. Oh, I didn't own any.

Q. Your professional record is divided into three periods, namely, the period before your marriage to Mr. Florence, the period during your marriage to him, and the period since his death? A. Yes, sir.

Q. Now, what was the success of your theatrical life after the death of Mr. Florence, financially?

Mr. FETTRETCH: Objected to as irrelevant, incompetent, and immaterial, and we move to strike out the answer.

A. I surely don't know how to answer that question.

Q. How much money or property have you earned in your profession since the death of Mr. Florence? A. Not one penny.

Q. On the contrary, have you not lost money in theatrical ventures since his death? A. Yes; in one engagement since his death.

Q. How long after his death did you follow the calling? A. Six months.

137 Q. And that, as I understand, was a losing experience, financially? A. Yes, sir.

Q. How much did you lose? A. I can't tell.

Q. Who was your manager? A. Mr. Coveney.

Q. Was a Mr. Weston connected with you? A. I don't know as that was his name; I think it was.

Q. Didn't you lose between $12,000 and $15,000 during that time? A. No, sir.

Q. How much did you lose approximately? A. I think it was less than $10,000. I can't be certain, because I can't remember.

Q. You say Mr. Florence was with Mr. Jefferson the last two seasons of his life? A. Yes.

Q. What were the terms? A. I don't know.

Q. What was his income? A. Oh, yes, I know that.

Q. How much was his income during his engagement? A. $300 a week, and I got $150 from it.

Q. Is that all he got? A. Yes. His next engagement was for $200, and I got $100 from that.

Q. Was your engagement with him? A. Not that season. I was ill and had to go to Europe for rest and on account of my
138 ill-health. My husband joined Jefferson, and that was the cause of his death.

Q. Were you associated with your husband during either of the seasons that he was with Jefferson? A. Yes; in his affairs. I did not act with him, but I was associated with him. Of course, he had to take care of me and paid a big salary, and I saved it and came to his rescue to buy the Washington property.

Q. He gave you half of his earnings, though you did *you* act with him? A. Yes, sir.

Q. And you let him have some of that back to help him pay for the Washington property, did you? A. Yes, sir; I did.

Q. Did you accompany him on either of those tours with Jefferson? A. Once. Once I did, but I found it was so wearisome that I stopped.

Q. That is, as the money was earned, it was divided between you? A. Yes; decidedly, or I would not have had the money to save.

Q. Before he went with Jefferson, who was his manager? A. Alf. Hayman.

Q. Was he the manager down to the time Mr. Florence went with Mr. Jefferson? A. Yes; up to that time.

Q. Do you know Mr. Elliott? A. Yes, sir.

Q. Wasn't he a manager for ten years before Mr. Florence went with Mr. Jefferson? A. Only four years—not ten years;
139 that is quite a mistake; four years before Mr. Hayman joined us. Mr. Hayman was with us until Mr. Florence joined Mr. Jefferson.

Q. How long was Mr. Hayman with you? A. Oh, I think three or four years; the best years we ever had.

Q. When Mr. Elliott was with you, did you receive a salary, and how much per week? A. Well, that would depend upon the receipts at the end of the week. I always shared half and half.

Q. There was a division every week? A. Yes; I banked every week and Mr. Florence banked with me.

Q. Did the manager pay you? A. No; my husband paid me.

Q. Did none of the managers pay you? A. No; I never received any money except from my husband.

Q. You are quite sure you did not get $50 a week from Mr. Elliott? A. No, sir; I am sure.

Q. When was this agreement made between your husband and yourself that you would be joint partners? A. When we were married.

Q. That was in 1853? A. Yes, sir.

Q. And from that time you divided your money weekly? A. Yes, sir.

Q. Now, Mrs. Coveney, what part did you take in the management of the business besides performing your part as actress?

140 A. Well, I was the manageress.

Q. What did you do? A. Played; worked.

Q. You simply played your parts? A. I did, and got plenty of money for it.

Q. Now, please tell us the first investment ever made in your joint names. A. The 62 Park Avenue house, the property in Central park, and the Bushwick property. The Brooklyn property was in my name.

Q. Was the 62 Park Avenue property then in your joint names? A. No; but I helped Mr. Florence pay for it. I gave him money to help him pay it, and he afterwards gave it to me as a birthday present.

Q. I ask you what property was in your joint names, and you mentioned 62 Park avenue? A. 62 Park avenue.

Q. Now you say it was not ever in your joint names? A. Not at present. First, when Mr. Florence got into some trouble about stocks he said to me that he had not enough money to pay for the balance due on the Park Avenue house, and he said, "Can you assist me?" I said, "Yes," and I gave him enough to pay for the investment.

Q. Up to that time the Park Avenue property had been in his name, had it not? A. Yes; but not exactly in his name, because I had helped to pay for it.

Q. Was not this the situation, the Park Avenue property had first stood in Mr. Florence's name and then you and he conveyed it to Mr. Cogan, and then Mr. Cogan on the same day deeded it

141 to you? A. Yes, sir.

Q. Now, did the Central Park property stand in your joint names? A. Yes, sir.

Q. Deeded to you two together? A. Yes, sir.

Q. What became of that? A. It was sold.

Q. Now, the Bushwick property stood in your joint names? A. Yes, sir.

Q. What became of that? A. Sold.

Q. The Brooklyn property always stood in your name? A. Always.

Q. So the only property that ever stood in your joint names was the Central Park and the Bushwick property? A. Yes, sir.

Q. Where is the Bushwick property situated? A. It is now a part of Brooklyn.

Q. At the date of this will, May 5, 1876, what property stood in Mr. Florence's name, if any? A. I don't think he had any property then at all; not at that date; it was all afterward.

Q. The Park Avenue property was then in your name, was it? A. In my name.

Counsel for defendants on cross-bill calls for paper marked for identification A. T. C. Cross-bill, Exhibit 4, which is produced.

Q. In this paper, which is a receipt from Whetmore and Bowne, dated October 12, 1877, I find an item of $20 for drawing
142 deeds to Mr. Cogan and back to you. That was the Park Avenue property, was it not? A. Yes, sir.

Q. This same bill refers to an examination and abstract of premises on the south side of 16th street, in Brooklyn, does it not? A. Yes, sir.

Q. That always was in your name? A. In my name.

Q. So that when this will was made Mr. Florence had had the Park Avenue property conveyed to you and the Brooklyn property conveyed to you, and there was nothing in his name? A. No, sir.

Q. Thereupon you made these wills so he could get it back again? A. So if I died he could get it and if he died I could get it all.

Q. These wills were first executed in the office of Mr. Bowne? A. Yes, sir.

Q. And then you and Mr. Bowne went to take luncheon? A. Yes, sir.

Q. Mr. Zener did not go with you to luncheon? A. Only this one gentleman.

Q. Did either of them go to the bank with you? A. I think they did; I am sure Mr. Bowne did. We went to the Park bank.

Q. Why did you go there? A. To further execute them and leave them there.

143 Q. When you went to luncheon did you go back to Mr. Bowne's office? A. No.

Q. You went to the Park bank? A. Yes, sir.

Q. Then Mr. Zener could not have been with you? A. I am not quite sure; I think he was with us.

Q. What was the East Broadway house? A. That was in our joint names.

Q. That was sold also? A. Yes; that was sold.

Q. What was done with the money? A. I got my share. I got my share because I gave him some money for it.

Q. You have produced a list of securities here, footing up about $40,000. Your husband left this at the time of his death? A. Yes, sir.

Q. There are 164 shares of Eagle Fire Insurance Co. stock of the par value of $6,500 for the 164 shares. Did you sell that stock? A. No, sir.

Q. Is it worth par or more than par? A. That I don't know.

Q. Here are three bonds—Metropolitan Gas Company bonds, five hundred each; do you know these? A. Yes, sir.

All this evidence has been taken subject to objection, and this is to apply to the evidence on the same subject in regard to similar items in the paper.

144 Q. You say you don't know whether these bonds were at par or not? A. I don't know.

Q. Do you still own the $13,000 of Consolidated gas stock? A. Yes; I have it, but I don't know if it is $13,000 or not. I don't know — it is worth.

Q. Do you still own it? A. Yes; but I think it is only $10,000 instead of $13,000.

Q. Was any of it sold? A. No; but it is not $13,000.

Q. Do you still own the five thousand of Bushwick Street Railroad stock? A. No; that was sold.

Q. Who sold it? A. It was sold by me.

Q. What did you get? A. I don't know what it was.

Q. Do you still own the 2,500 par value of the German-American Insurance Co. stock? A. Yes, sir.

Q. Do you know what that is worth? A. No; I don't know.

Q. You got this $9,771 worth of real-estate mortgage paper from Thomas J. Fisher & Co. after your husband's death? A. Yes, sir.

Q. What other property did your husband leave besides these items mentioned in this paper? A. That is all; that is all he left.

145 Q. What rent did the 62 Park Avenue property yield at the time of his death? A. $200 a month.

Q. What did that property cost? A. It cost $37,000 and something.

Q. What did the Brooklyn lots cost? A. I think we paid $3,000.

Q. What did the Central Park property cost? A. That I don't know. I have forgotten.

Q. Did Mr. Florence ever give you any other property besides this we have been talking about today? A. That is all.

Q. Ever give you any bonds? A. No; but I shared the money.

Q. Did he ever give you any other bonds in his lifetime? A. No, sir.

Q. Did you ever own any Government bonds in his lifetime? A. No; never.

Q. Your daughter said something about your being in a convent in France; when was that? A. I don't know; I was simply there for rest.

Q. You were there one year? A. No; I think I was there eight months—not quite a year.

Q. You were there through the theatrical season, were you not? A. Yes, sir.

Counsel for the defendant produces memorandum showing a deed

from Anson Livingston and wife to William J. Florence,
146 dated and recorded May 12, 1870, in Liber 1131 of Conveyances, page 568, of the Park Avenue premises; a deed from William J. Florence to James Cogan, made May 1st, 1876, recorded May 5, 1876, in Liber 1355 of Conveyances, at page 473, and a deed from James Cogan to Annie Teresa Florence, wife of William J. Florence, dated and recorded on the same dates, respectively, in the same liber, at page 472, and it is stipulated that this shall be taken as the true dates of these conveyances, unless counsel find them to be erroneous and subject to the objection of counsel for the complainant in the cross-bill as to their competency and relevancy.

It is stipulated that the Washington property described in the bill and cross-bill was conveyed to William J. Florence by deed dated 1887, and recorded in Liber 1258, folio 156, of the land records of the District of Columbia, attached to the amendment to the cross-bill and marked Exhibit A. A.

It is stipulated between counsel that the copy of the release of the deed of trust which was executed by Mr. Florence and wife, dated April 22, 1887, and recorded in Liber 1258, folio 158, of the land records of the District of Columbia, to secure the promissory note of William J. Florence of same date, in the sum of $10,000, being the balance of purchase-money of lots 23 and 24, in John B. Alley's and Harvey L. Page's recorded subdivision of lots in square
147 92, shall be considered in evidence at any time it shall be produced in this case, subject to like objections.

The original deed of trust is here offered in evidence, and is marked Exhibit W. J. F., Exhibit 1, subject to like objections.

By Mr. FETTRETCH:

Q. You were asked about some of this real estate, and when you spoke of its being in your joint names did you mean the title was in your joint names, or what did you mean? A. Titles and everything.

Q. When you say that the title of some of the property here stood in your joint names do you mean the deeds stood in your joint names—as Annie Teresa Florence and William J. Florence? A. I think in both.

Q. Do you remember the making of any payments on that Washington property?

Q. One was $7,000 and something.

This testimony is objected to on the ground that it is not responsive to the cross-examination, and on the further ground that the witness is not competent to testify about a transaction between herself and husband, and on the further ground that the testimony will be in violation of the spirit of the act prohibiting the testimony of one of the parties to a transaction after the death of the other party.

Q. Do you remember after Mr. Florence had purchased the Washington property if you gave him any money? A. Yes, sir; but I can't remember the date.

148 Q. How much was it? A. It was $7,000 and something more.

Q. Do you know whether, during his lifetime, Mr. Florence did anything for his family and relations? A. Yes; I should think so.

Objected to.

Q. What do you know of your own knowledge? A. I know he paid his brother John's rent, for I had the checks for $25 for a long time.

Q. Do you know if he did anything for the other members of the family? A. Yes; he helped them constantly.

Q. Do you know whether during the years of your married life Mr. Florence aided his family from time to time financially? A. Yes, sir; I do.

Q. Did he do that to any extent? A. As far as rent and clothes are concerned, he did.

Q. He helped them as a man should his relatives? A. Yes, sir.

Recross-examination.

By Mr. DARLINGTON:

Q. Were the members of his family in need of his help? A. They were in every way.

Q. And he knew that fact, and responded to that need? A. Yes, sir.

149 Q. That continued up to the time of his death, did it? A. Up to the time of his death.

Q. I understand that you claim that you furnished some money to help pay off this debt. A. You mean the Washington property? Certainly, I did.

Q. Can you give us the amount? A. It was $7,000 and more.

Q. Where were you when you did that? A. In New York city, at the Fifth Avenue hotel.

Q. I suppose these large sums were paid by check? A. No; not by check, in money.

Q. How many such little sums of money did you have lying around in your rooms at the 5th Avenue hotel? A. I didn't have it lying around my rooms. I had it in a box. We had at one time $25,000 that John W. Mackey gave us in a gold brick.

Q. Give us, as nearly as you can, the time when you made this advance of $7,500. A. It was our first engagement in California. It was while we were performing the Mighty Dollar in California.

Q. Was it shortly after your engagement, your first one in California? A. Yes.

Q. What house was it you paid for out of that money? A. The 62 Park Avenue house. We never had any other house but that.

Q. And that house was paid for out of a part of the California money, was it? A. Yes; out of money I helped to earn.

Q. And when you sold this brick house you bought the Park

Avenue house? A. Yes, sir; and I gave my husband the
150 money to buy it with.

Q. And this happened while this Christine was in your employ? A. Yes, sir; and then we went to Europe.

Q. I think you said that Christine saw you give this money to your husband? A. Yes, sir; she went down and got the box; brought it up; saw the money, and saw me take it out. After Mr. Florence took the money I had $10,000 left.

Q. What did you do with that $10,000? A. I kept it. When I went to Europe I got a whole lot of clothes.

Adjourned to April 15th, at 1 o'clock.

NEW YORK, *April 15th*, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

It is stipulated between counsel that the $10,000 deed of trust which Mr. Florence gave to secure the amount of purchase-money on the property involved in this suit was released on April 16, 1889, the release being recorded on the following day, and recorded in Liber 1373, at folio 419, of the land records of the District of Columbia. Counsel for plaintiff on cross-bill offers in evidence the paper heretofore marked for identification and it is marked "A. T. C. Cross-bill, Exhibit 4."

151 ANNIE TERESA COVENEY recalled.

By Mr. DARLINGTON:

Q. Do you remember when Christine Narini was married? A. It was about 1883 that she was married, and from the Fifth Avenue hotel.

Q. And she then left your employ? A. Yes, sir.

Q. Has she ever been employed by you since then? A. No; only as a dressmaker.

Q. She has an establishment and has worked for you at that place, has she not? A. Yes, sir.

Q. Never at the hotel? A. No, sir; never.

Redirect examination.

By Mr. FETTRETCH:

Q. In your answer to Mr. Darlington's question, you have testified this morning that Mrs. Narini was not in your employ after her marriage in 1883. A. No; she was not.

Q. And you testified yesterday that this money which you advanced towards the Washington property was advanced while Christine was in your employ. A. Yes, sir; I testified that, and it is right.

Q. Explain how that can be, when she left you upon her marriage in 1883, and the Washington property was not bought until afterwards? A. Then she must have made a mistake in the date.

Q. When she was in your employ, and at the time the money was advanced, was she present when you sent down to get the money?

152 This line of questioning is objected to on the ground that the questions are quite leading and are scarcely admissible under the circumstances.

Question is withdrawn.

Q. Explain, if you can, the circumstances of the payment of the money, as you stated yesterday, while Christine was in your employ, it appearing that the Washington property was not purchased until 1887, and Mrs. Narini having testified that she was married in 1883.

Objected to on the same ground as above.

A. I don't understand that. That must be a mistake some way. She must have made a mistake in the date. She was *was* with us when we bought the property.

Q. Irrespective of the date when the money may have been paid for the Washington property, is it a fact that you advanced any money on the property and towards its purchase?

Objected to as not responsive on cross-examination and as reiterative in leading form of testimony.

A. Yes, sir.

Q. And what was the amount? A. $7,500 or $7,600—I am not sure which.

By Mr. DARLINGTON:

Q. That was the same $7,000 or $7,500 that you got out of the box that Christine brought from the clerk's office? A. Yes, sir; that was the same, leaving a balance of $10,000 in the box after we took out the $7,000 or $7,500 payment on the Washington property. Mr. Larry Jerome was present. John McCullough and John Herscher were both present. They were in the room and saw it. Then Mr. Florence wrote a dispatch, in answer to a dispatch that he

153 received from John Ennis, who was in Washington, in which Ennis said, "You must pay, or you will lose what you have paid on the Washington property." It was mortgaged. Mr. Florence had lost $85,000 in stocks and he asked me to give him the money, and I gave him the money. Then he sent a dispatch, "All right, John; Annie has come to my rescue. She has lent me the money."

Q. Who was Larry Jerome? A. He is an uncle of Lady Church——

Q. Who was John McCullough? A. He was an actor.

Q. A Shakesperian actor? A. Yes, sir; and John Herscher is a club gentleman.

Q. And this transaction took place while Christine Narinia was in your service? — ——

Q. Before she was married? A. Yes.

Q. She was married here in New York? A. Yes; from the 5th Avenue hotel.

Q. I suppose the marriage-license records will show the date which you have not? A. I suppose so.

ANNA T. COVENEY.

Adjourned.

The following are copies of the above-named exhibits, A. T. C. Cross-bill, Exhibit 1; A. T. C. Cross-bill, Exhibit 2; A. T. C. Cross-bill, Exhibit 3, and A. T. C. Cross-bill, Exhibit 4.

154 NOTE.—For Exhibit A. T. C. Cross-bill, Exhibit No. 1, see Exhibit A. T. C. No. 1, page 27.

Surrogate's Court, City and County of New York.

Be it remembered that, in pursuance of section 2629 of the Code of Civil Procedure, I hereby certify that on the fifth day of April, 1892, the last will and testament — William J. Florence, deceased, being the foregoing written instrument, was upon due proof duly admitted to probate by the surrogate's court of the city and county of New York, and by the surrogate of said city and county, as and for the last will and testament of the said deceased, and as a will valid to pass real and personal property. Said last will and testament and proofs are recorded in the office of said surrogate in Liber 474 of Wills, page 14.

In testimony whereof I have hereupon subscribed my name and affixed the seal of office of the surrogate of said city and county this 23rd day of November, one thousand eight hundred and ninety-two.

JAMES F. McLAUGHLIN,
Clerk of the Surrogate's Court.

155 "A. T. C. CROSS-BILL, EXHIBIT 2."

I, Anna Teresa Florence of the city of New York wife of William J. Florence do make, publish and declare this my last will and testament in manner following, that is to say:

First. I order and direct that all my just debts and funeral expenses be paid by my executor hereinafter named so soon after my decease as the same can conveniently be done;

Second. I give, devise and bequeath unto my husband William J. Florence all my estate real and personal and such as I shall die seized and possessed of wheresoever and whatsoever: to have and to hold to him, his heirs, executors, administrators and assigns, according to the nature and quality of the estate, forever.

And I do nominate and appoint my said husband, executor of this my last will and testament.

In testimony whereof I have hereunto set my hand and seal this fifth day of May, one thousand eight hundred and seventy-six.

(S'g'd) ANNIE TERESA FLORENCE. [SEAL.]
(S'g'd) ANNIE TERESA FLORENCE. [SEAL.]

Signed, sealed, published, and declared by the above-named testatrix as and for her last will and testament, in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

RICHARD H. BOWNE,
177 *2nd Ave.*
GEO. W. ZENER,
194 *Devoe St., Bklyn.*
WM. H. DAKIN,
241 *Ryerson St., Brooklyn, N. Y.*
A. P. SCHULTZ,
333 *East 118th St., N. Y. City.*

Written across the face of this will was marked: "Revoked Dec. 23rd, 1891. Annie Teresa Florence."

156 NOTE.—For Exhibit A. T. C. Cross-bill, Exhibit 3, see Exhibit A. T. C. No. 3, page 37.

"A. T. C. CROSS-BILL, EXHIBIT 4.

Mr. W. J. Florence to Wetmore & Bowne, Dr.

M'ch. '73.

To exam'n'g title to prem. S. side 16th St., Brooklyn, bot. of Ponce de Leon, & mak'g abstract	$60.00
" cash pd. for searches, 3/5	21.15
" do. rec'd'g two releases	2.10
" do. rec'd'g deed to you	2.00
" draw'g wills of self & Mrs. Florence	20.00
" draw'g deeds from you to Mr. Cogan & back to Mrs. Florence to vest title	20.00
" cash pd. record'g at $2.50	5.00
	$130.25

Rec'd pay't,
WETMORE & BOWNE.

Oct. 12, '77."

On back is the endorsement: "Wetmore & Bowne, paid bill, $130 for searches, etc."

157 *Depositions on Behalf of Defendants in Cross-bill.*

Filed April 16, 1900.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN ET AL.
vs.
PETER CONLIN ET AL. } No. 16225. Equity.

NEW YORK, *March 30th*, 1900.

Depositions of sundry witnesses taken before Thomas F. Daniels, notary public of the State of New York, pursuant to commission hereto annexed.

At the execution of the foregoing commission issued out of the supreme court of the District of Columbia, and to me directed, empowering me to examine witnesses in the above-entitled cause, I, Thomas F. Daniels, the commissioner in the said commission named, first duly took the following oath, viz:

"I shall, according to the best of my skill and knowledge, truly, faithfully, and without partiality to any or either of the parties, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, orally, so help me God."

I then proceeded, on the thirtieth day of March, in the year of our Lord nineteen hundred (1900), at the office of Mr. Joseph Fettretch, No. 41 Park row, in the city and State of New York, at eleven o'clock a. m., under the said commission, pursuant to
158 notice, to take the following depositions, in the presence of counsel for the respective parties, to wit:

Mr. J. J. Darlington appearing for the defendants to the cross-bill, and Mr. Joseph Fettretch and Mr. Miller appearing for the complainant in the cross-bill.

It is stipulated by counsel for the respective parties that the testimony to be taken under the annexed commission be taken stenographically and reduced to typewriting.

Mr. MILLER: I would ask that all witnesses to be examined be excluded from the room during the examination of the witnesses under examination.

Mr. DARLINGTON: If you think that is necessary, let it be done.

(The witnesses to be examined are thereupon escorted from the room.)

NEW YORK, *March 30th*, 1900.

JOHN W. MACKEY, a witness of lawful age produced on behalf of the defendants to the cross-bill, being by me first duly sworn according to law, being examined orally by counsel, makes oath, deposes, and says as follows—that is to say:

Direct examination.

By Mr. DARLINGTON:

Q. Will you kindly state your name? A. John W. Mackey.

159 Q. I believe you reside in the city of New York? A. I am part of the time here and part of the time my legal residence is in Nevada; I am part of the time here in New York.

Q. Did you know the late William J. Florence, the actor? A. Yes, sir.

Q. And Mrs. Florence, his wife? A. Yes, sir.

Q. Do you remember their visiting California with the Almighty Dollar some years ago? A. I do, sir.

Q. It is claimed, Mr. Mackey, the property in controversy here was in part paid for out of the proceeds of a $25,000 gold brick presented by you to Mrs. Coveney or Mr. Florence and his wife; do you recall such a transaction as that?

Mr. MILLER: That is objected to on the ground that there is no testimony tending to show that this property was purchased out of said brick.

A. I never paid Mr. Florence or Mrs. Florence any gold brick of $25,000, or any gold bar.

Q. Neither gold bar nor gold brick? A. No, sir; nor gold brick nor any other kind.

Q. Did you know the late John McCullough, the actor? A. Yes, sir.

Mr. FETTRETCH: I would like to have the previous question reread.

160 (The stenographer repeats from his notes the question referred to as follows: It is claimed, Mr. Mackey, that the property in controversy here was in part paid for out of the proceeds of a $25,000 gold brick presented by you to Mrs. Coveney or Mr. Florence and his wife; do you recall such a transaction as that?)

Mr. FETTRETCH: May we add to our objection also the objection that the question calls for evidence in regard to a matter brought out on cross-examination, and that the evidence was the evidence of the defendants to the cross-bill in cross-examination, and they are not entitled to contradict it?

Mr. DARLINGTON: I find, after looking at the record of Mrs. Coveney's testimony, page 71, that the Park Avenue house is said to have been bought out of the proceeds of a brick, so the contract shows that is a clerical error; it should have been a gold brick.

Mr. FETTRETCH: There are several clerical errors which we have to correct.

Mr. DARLINGTON: Gold brick was the language used.

Q. Do you remember how long before Mr. McCullough's death it was that he was mentally affected?

Mr. FETTRETCH: Objected to as immaterial, irrelevant, and incompetent.

A. I don't know exactly; I have seen Mr. McCullough here once or twice, and I went up to Bloomingdale insane asylum to see him, but I don't know the exact date it was; it was some time, anyhow.

Q. Do you think as much as a year or two? A. I should think so.

161 Mr. DARLINGTON: That is all.

Mr. FETTRETCH: We have no questions to ask.

THOS. F. DANIELS, *Com'r*,
For JOHN W. MACKEY.

JOHN G. HECKSHER, a witness of lawful age produced on behalf of the defendants to the cross-bill, being by me first duly sworn according to law, being examined orally by counsel, makes oath, deposes, and says as follows—that is to say:

Direct examination.

By Mr. DARLINGTON:

Q. Will you please state your full name? A. John Gerard Hecksher.

Q. You reside in the city of New York? A. Yes, sir; at 71 West 75th street.

Q. Do you know the late William J. Florence, the actor? A. Very well, indeed.

Q. And his wife? A. Both.

Q. It is claimed, Mr. Hecksher, that about the month of April, 1887, you, Mr. Larry Jerome, the late John McCullough, and a Mr. Connor, the proprietor of a hotel here, were in the rooms of Mr. Florence and his wife at the Fifth Avenue hotel; that Mr. Florence brought into the room a telegram from Washington, stating that he must immediately send some money there or he would lose what he had paid on some property; that thereupon Mrs. Florence sent for a box which she had in the office of the hotel, and took out of
162 that box some $5,000 or $6,000 and gave it to her husband to save the property, in your presence, and that you saw it. Please state what you know about that transaction or any transaction of that sort, if you know anything.

Mr. FETTRETCH: Objected to as irrelevant, incompetent, and immaterial, and also as to the form of the question.

A. Such a thing never occurred in my presence.

Mr. DARLINGTON: That is all.

Cross-examination.

By Mr. MILLER:

Q. Mr. Hecksher, you frequently visited Mr. and Mrs. Florence at that hotel, didn't you? A. I had the pleasure of seeing Mrs. Florence

occasionally, but I had the pleasure of seeing my friend, Mr. Florence, very often.

Q. She was there when you visited him? A. She was there when I visited at times, but not always; I was there sometimes on an average of three times a week, and probably I would not have the pleasure of seeing Mrs. Florence more than once a month.

Q. Can you tell us how often you did visit there in 1887? A. I could not answer that question at this time.

Q. Do you think you visited on an average of three or four times a week? A. That I could not say; I was there frequently.

Q. You were there frequently about that period? A. Yes, sir.

Q. Do you recollect being there with some gentlemen on that day, at the time this affair is said to have occurred, and a
163 talk of some matters about money? A. Never, sir.

Q. You don't recollect that? A. No, sir.

Q. You recollect a conversation between Mr. and Mrs. Florence when these gentlemen were there and you walked over to the window to smoke a cigar? A. No, sir.

Q. This affair might have occurred, though, while you were in the room without your noticing it particularly, might it not? A. No, sir; because I knew Mr. Jerome very intimately, and I knew Capt. Connor, and I knew McCullough, and we never met in his rooms together.

Q. You never did? A. We never did, sir. I have met there with Mr. Billy Connor, that is all.

Q. Well, at the time, then, you and Mr. Connor met there, might not this question as to money matters have been talked over between Mr. and Mrs. Florence and you stepped to one side? A. Not that I can recollect in any way.

Mr. DARLINGTON: I object to the question because the testimony given is as to Mr. Hecksher seeing this transaction.

Q. Were you and Mr. Jerome ever there together? A. Not to my recollection.

Q. You may have been, though? A. We might have been, of course.

Q. But you have no recollection of meeting Mr. McCullough there, you say? A. Never. If you will allow me to explain,
164 I will tell you why. My hours, before going down to my broker's office—I had a broker's office then, down on Wall street, and I had an uptown office; sometimes, just before the board would open, I would run upstairs and ask Billy if he would lunch with me, that I had such and such people there.

Q. Were you ever there in the evening? A. I may have been.

By Mr. FETTRETCH:

Q. With anybody else? A. No one.

Q. Did you see anybody there? A. Not to my recollection.

Q. You would not swear that you did not meet somebody there at those times that you went? A. Well, I would almost be inclined to swear; I could not swear, no.

By Mr. MILLER:

Q. You might have met people there, you might have met these gentlemen who have been referred to? A. I might; but I have no recollection.

Q. It is a good many years ago? A. It is, indeed.

Q. And you had no interest in keeping track of any of the affairs of Mr. and Mrs. Florence, had you? A. Not in the slightest. My relations with Mr. Florence consisted mostly of our fishing boxes, and when we had a chance we talked salmon, rod, and such things. Mr. Florence never spoke to me about shop.

Q. About shop? A. About acting or anything of that kind. He avoided all that.

165 Redirect examination.

By Mr. DARLINGTON:

Q. When you called at Mr. Florence's rooms and his wife was present, was it your habit to smoke cigars in her presence—in the presence of a lady? A. Well, in those days I did not smoke; it is only in the last two years I have taken up the smoking of cigarettes.

Recross-examination.

By Mr. MILLER:

Q. Well, might not the other gentlemen you met there have smoked? A. That is possible.

Q. You might have gone over there with them when they were smoking? A. That is quite possible.

THOS. F. DANIELS, *Com'r*,
[SEAL.] For JOHN G. HECKSHER.

166 JOSEPH S. CASE, a witness of lawful age produced on behalf of the defendants to the cross-bill, being by me first duly sworn according to law, being examined orally by counsel, makes oath, deposes, and says as follows—that is to say:

Direct examination.

By Mr. DARLINGTON:

Q. Mr. Case, please give us your full name. A. Joseph S. Case.

Q. You reside where? A. 276 Jefferson avenue, Brooklyn.

Q. What is your occupation? A. Cashier of the Second national bank.

Q. How long have you been connected with that bank? A. Thirty-two years.

Q. Did you know the late William J. Florence? A. Yes, sir; I did.

Q. Did he have an account with your bank? A. Yes, sir.

Q. Have you here any book or books of that bank showing the

state of his account with you in the months of March, April, and May, 1887? A. I have the ledgers.

Q. Will you kindly produce the books?

Mr. MILLER: This is objected to on the ground that it is immaterial, irrelevant, and incompetent, and nothing has been raised in the issue as to Mr. Florence's accounts.

(Witness produces a ledger.)

167 By Mr. FETTRETCH:

Q. Is that the book of original entry? A. Yes, sir; the bookkeeper enters right from the checks.

By Mr. DARLINGTON:

Q. You produce the book showing the account? A. I do; the ledger of March and April, 1887.

Q. Now, will you kindly give us from that book the state of Mr. Florence's account in March, giving the dates, as shown by the book?

Mr. FETTRETCH: The same objection is made to that as to the proceeding question.

A. This is ledger from March 29th, 1887, to May 21st.

Q. From that book, please state what was the condition of Mr. Florence's account from March 21st, 1887.

Mr. FETTRETCH: The same objection is made to that as to the proceeding question.

Mr. DARLINGTON: We agree that these objections shall apply throughout the examination of this witness without the necessity of stating them.

A. The balance on the 29th and 30th of March was $8,124.13, and the book was written up on that day, so that balanced the pass book.

Q. Now, from that date to the 22nd of April, please state the smallest balance which Mr. Florence had to his credit with your bank. A. The 22nd day of April the smallest balance was $6,996.95.

Q. Do you find any considerable check drawn against that account between those dates? A. There were several checks,
168 varying in amount from $25 up to $5,752.50, on the 21st or 22nd, that was charged.

Q. What other checks do you find between those dates, March 21st and April 22nd? A. Well, a check on the 21st of March, $158.80; on April 2nd there were two checks, one of $125 and $400; on April 5th there were three, one of $3.36, $7.50, and $62.12, and on the 12th there were three, one of $28.50, one of $13.80, and a $20; on the 14th of April there was one of $79.65, and another of $75.25, and one of $50; on the 16th there was one of $783.20; on the 19th there were four, one of $50, one of $14.50, one of $133.75,

and one of $218.45, and on the 21st there was a certified check for $5,752.50.

Mr. MILLER: That is on the 21st of April, 1887?
WITNESS: That is on the 21st of April, 1887.

Q. After that in April were there any further checks? A. On the 23rd of April there was a check of $78, and another of $2,264.75; on the 26th there was one of $112.

Q. Now, will you oblige us by giving us the deposits or other credits made by Mr. Florence from March 29th to the end of April? A. On April 13th there was one of $680; on the 22nd there was one of $2,000; on the 25th, $500, and that is all up to the first of May.

Q. What was the date of the certified check? A. Either the 21st or 22nd; the columns run together there and I can't state.

Q. On the 22nd of April, deducting the amount of the certified check, what was his balance? A. Without adding the credits in of the same dates, $827.75.

169 Q. What was the credit of that same date? A. $2,000; it made the balance $2,827.75 on the 23rd.

Cross-examination.

By Mr. FETTRETCH:

Q. Now, Mr. Case, can you tell us from your book in whose favor that certified check of $5,752.52 was drawn? A. I cannot; that is a record banks do not keep.

Q. Will you just give us the balances to the credit of Mr. Florence in the rest of the month of April, commencing from where you left off? A. The balance on the 23rd was $2,827.75; the balance on the 27th was $985; on the 29th it was $873; on May 2nd it was $873; on May 4th it was $873; on May 6th it was $873; on May 8th it was $833; on May 11 it was $833; on the 13th, $833; on the 16th, $773; on the 18th, $753; on the 20th, $753; on the 23rd it was $753; the rest is in the other ledger.

Mr. FETTRETCH: That is as far as I want.

Cross-examination.

By Mr. MILLER:

Q. I would like to ask you one question, Mr. Case. Can you tell me what deposits were made in the month of March, 1887? A. This ledger does not go far enough back for that; there was one of $800 made on the 28th of March.

Q. Can you tell me what deposits then were made in the month of April? A. You have got all that; I read those.

Q. Have you any book that will show what was deposited in March? A. Yes; the previous ledger to this.

170 Q. Is that here? A. No, I did not bring that; I was merely to bring the April and May ledgers. This book commences with the 26th of March. We go out of one ledger into another.

Q. Could you furnish us, without recalling you, and file with the commissioner, a statement showing the amount of deposits in March? A. Oh, yes. A statement?

Q. Yes. A. Yes; I will send that down.

Q. And the amounts that were drawn out in the month of March? A. Yes.

Mr. MILLER: There is no objection to that, Mr. Darlington?

Mr. DARLINGTON: None in the world.

It is agreed that the statement to be sent down to the commissioner by the witness shall be embodied in the minutes as part of the testimony.

The statement produced by the witness is marked "Defendants to Cross-bill's Exhibit No. 2, March 30th, 1900, T. F. D., com'r." It is as follows:

Transcript a/c W. J. Florence, a/c M'ch 1, '87, *to M'ch* 31, '87.

Wm. J. Florence in a/c with Second National Bank of the City of New York.

DR.				CR.		
1887.				1887.		
M'ch	1.	Paid	74.20	Mar.	1.	Balance	6,998.98
"	16.	"	630.		14.	Deposit	1,250.
"	17.	"	35.		23.	"	300.
"	18.	"	50.		28.	"	800.
"	19.	"	35.80				
"	21.	"	16.50				
"	"	"	300.				
171							
"	24.	"	58.15				
"	26.	"	25.50				
"	31.	"	158.80				
		Balance	7,965.33				
			9,348.98				9,348.98
				Ap'l	1.	Balance	7,965.33

THOS. F. DANIELS, *Com'r*,
For JOSEPH S. CASE.

[SEAL.]

ZENAS E. NEWELL, a witness of lawful age produced on behalf of the defendants to the cross-bill, being by me first duly sworn according to law, being examined orally by counsel, makes oath, deposes, and says as follows—that is to say:

Direct examination.

By Mr. DARLINGTON:

Mr. DARLINGTON: We subpœnaed Mr. Newell, served him with a *subpœna duces tecum*, asking him to bring down his books, and he telephoned that they were quite bulky and asked if we would take a transcript from the books properly verified. I said that would be quite satisfactory, as it is, to me, and if it is satisfactory to you we will take his statement. He has not got his books here.

Mr. FETTRETCH: Books of what?

Mr. DARLINGTON: Ledgers, &c., just like Mr. Case's books. (To witness:) Have you a transcript with you?

(The witness produces paper, which he hands to Mr. Fettretch.)

172 Mr. FETTRETCH: There is no objection. He can testify as though the books were here.

Mr. MILLER: But we take the same objections to this gentleman's testimony as was taken to the testimony given by Mr. Case.

—. Mr. Newell, please state your full name. A. Zenas E. Newell.

Q. You reside here in New York? A. No; in Yonkers.

Q. What is your occupation? A. Cashier of the East River national bank, New York.

Q. How long have you been connected with that bank? A. Since 1859.

Q. Did you know the late William J. Florence? A. I did.

Q. Did he have an account with your bank? A. He did.

Q. Have you made a statement prepared from the books of your bank, showing the state of his account with you during the months of April and May, 1887?

Mr. FETTRETCH: This is taken subject to the same objection as was taken to the evidence of Mr. Case, and those objections are to apply to all of this witness's testimony.

Mr. DARLINGTON: That is agreed to.

A. I have.

Q. What period of time does that statement cover? A. From March 15th, 1887, to June 11th, 1887.

Q. What was the smallest balance Mr. Florence had to his credit with your bank during that period? A. $7,317.50.

Q. What credits during that period did he make with
173 you—what deposits or credits? A. May 23rd, $91.67; April 2nd, $390; April 16th, $321; April 19th, $291.67; May 6th, $150; May 13th, $141.67; June 3rd, $291.67.

Q. Those are all the deposits or credits to that account during the period covered by that statement? A. Yes, sir.

Mr. DARLINGTON: I offer the statement in evidence.

Mr. FETTRETCH: Objected to on the ground that it is immaterial, irrelevant, and incompetent.

The statement produced by the witness is marked "Defendants to Cross-bill's Exhibit No. 1, March 30th, 1900, T. F. D., com'r." It is as follows:

Dr.	*W. J. Florence.*		Cr.
1887.		1887.	
March 16	25.	March 15. By balance	11,599.10
30	20.	23. Lewis	91.67
April 1	220.	April 2.	390.
Balance	11,815.77		
	12,080.77		12,080.77
23	428.	April 5. Balance	11,815.77
" c	2,000.	16.	321.
25	346.	19. Lewis	291.67
27	500.	May 6. do. on a/c	150.
June 8	813.78	13. Lewis	141.67
10 2	56.50	June 3.	291.67
11	1,000.		
	550.		
Balance	7,317.50		
	13,011.78		13,011.78

I hereby certify that the above is a true copy of the ledger of the East River nat'l bank, showing the account of Wm. J. Florence in that bank from March 15, 1887, to June 11, 1877, inclusive.

Z. E. NEWELL, *Cashier.*

Sworn to and subscribed before me this 28th day of March, 1900.

WILBUR F. SMITH,

[SEAL.] *Notary Public, Kings Co.,*

Certificate filed in N. Y. Co.

174 Mr. FETTRETCH: We have no cross-examination.

THOS. F. DANIELS, *Com'r,*

[SEAL.] For ZENAS E. NEWELL.

W. T. ELLIOTT, a witness of lawful age produced on behalf of the defendants to the cross-bill, being by me first duly sworn according to law, being examined orally by counsel, makes oath, deposes, and says as follows—that is to say:

Direct examination.

By Mr. DARLINGTON:

Q. Mr. Elliott, please state your full name. A. W. T. Elliott.

Mr. DARLINGTON: Gentlemen, among the little inaccuracies I find in the testimony for the complainant taken here, Mr. Elliott's name is given as W. I. instead of W. T.

Q. Did you know the late William J. Florence? A. Yes, sir.

Q. And his wife, Mrs. Florence, now Mrs. Coveney? A. Yes, sir.

Q. Were you at any time associated in business with Mr. Florence? A. Yes; I was with him for some time.

Q. In what capacity? A. Acting as manager and treasurer.

Q. For how long a time? A. In 1879, and I closed with him in

1888, and one season I was in Baltimore when he was in Europe, I think it was in 1881, I don't remember now.

175 Q. You were manager and treasurer in 1888? A. Yes, sir.

Q. About what time in 1888? A. The first part of the season, in 1888 up to the close of the first part of 1888.

Q. You mean in the spring of 1888? A. Yes, sir.

Q. After the severance of your business relations with him, who succeeded you as his manager? A. I think he went with Mr. Hayman and Mr. Wilson together, I believe.

Q. How long was it that he was with Haymen before he made his association with Mr. Jefferson? A. I don't know. I think that Mr. Hayman was with him one or two seasons; I don't recollect much about it now because I was not associated with him, but as far as I recall it was one or two seasons.

Q. Not less than one or more than two? A. No; not more than two.

Q. How long is a season? A. Sometimes it runs twenty-five weeks, sometimes thirty weeks.

Q. And by the season you mean that part of the year that is devoted to giving performances? A. Yes, sir.

Q. Do you know Christine Narini? A. Yes, sir.

Q. I mean the woman who was formerly maid to Mrs. Coveney? A. Yes, sir.

Q. Did you have an interview with her at her home in

176 Lexington avenue in the latter part of March or first part of April of last year? A. Yes, sir.

Q. Please state whether or not she said anything to you about being asked to be a witness in this case for Mrs. Coveney—— A. She told me.

Mr. MILLER: The answer to that is "yes" or "no."

Q. Did she say anything to you about it? A. Yes, sir.

Q. What did she say in that regard?

Mr. FETTRETCH: Objected to as irrelevant, immaterial, and incompetent, and also on the ground that it is in regard to matters brought out by cross-examination by the defendants.

A. She said that Mrs. Florence sent for her. I asked her when she saw Mrs. Florence, and she said not for a long while, but she said, "She sent for me and said she was going to have a lawsuit," and I said, "What about?" and she said, "About some property in Washington," and Mrs. Florence wanted to pay her for it, and she said she did not want any pay, but for her to pay her visit to Europe.

Q. Did she say how much Mrs. Florence offered to pay?

Mr. FETTRETCH: Same objection as before.

A. She said Mrs. Florence offered that, to pay her $500, but she did not want that.

Q. What did she say she told Mrs. Florence? A. She said she did not want that; if she paid her fare to Europe; that was all.
177 Q. She told you she told Mrs. Florence that? A. Yes.

Mr. DARLINGTON: That is all.
Mr. FETTRETCH: No cross-examination.

THOS. F. DANIELS, *Com'r*,
[SEAL.] For W. T. ELLIOTT.

I further certify that then and there, at the time and place named, it was agreed between the counsel for the respective parties that the testimony taken down in shorthand should be reduced to typewriting, and should be thereupon signed by me for the respective witnesses.

And I further certify that my fees for taking said testimony are $— and disbursements for obtaining and serving subpœnas, including subpœna fees, $12.90, which have been paid by the defendants to cross-bill, and that I am not of counsel for either party to this cause or interested in the event of the suit, and that I am now about to close the same with said commission under my seal, and being unable to personally return the same to the supreme court of the District of Columbia, I shall now place the said deposition in a sealed envelope directed to the clerk of the supreme court of the District of Columbia, and deposit the same, with postage prepaid, in the United States mail.

Witness my hand and seal this 2nd day of April, A. D. 1900.
[SEAL.] THOS. F. DANIELS, *Com'r*.

178 *Depositions on Behalf of Complainant.*

Filed April 25, 1900.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

Be it remembered that at the examination of the hereinafter-named witness-, begun and held on the 2d day of November, A. D. 1899, at 7.30 p. m., at the Normandie hotel, Washington, D. C., E. J. Stellwagen, Gasherie De Witt, Gregory I. Ennis, Ann Teresa Florence Coveney, and Christine Narini, and on January 25th, A. D. 1900, at the office of J. J. Darlington, Esq., 410 5th St. N. W., Washington, D. C., at 3.30 p. m., Hon. Mr. Justice Martin F. Morris, witnesses produced on behalf of the complainant in the cross-bill filed herein, who, being duly sworn according to law, were examined and testified as in the depositions shown; and I further certify that I am not the counsel for any of the parties to this proceeding, and have no interest in the case, and that my fee of $23.00 has been paid by the complainant to said cross-bill.

T. PERCY MYERS,
Examiner in Chancery.

179 In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } Equity. No. 16225.

Met at the Normandie hotel, in the city of Washington, on the 2nd day of November, 1899, at 7.30 p. m., pursuant to agreement between the solicitors in the above-entitled cause, to take, on behalf of the complainant in cross-bill, the testimony of the hereinafter-named witnesses.

The counsel for the parties have first consented that the testimony taken shall be taken down stenographically and reduced to typewriting.

Present: Joseph Fettretch and W. J. Miller, for Annie Teresa Coveney, complainant in cross-bill; Joseph J. Darlington and James F. Smith, for the defendants in cross-bill.

EDWARD J. STELLWAGEN, being duly sworn, testified as follows:

Direct examination.

By Mr. MILLER:

Q. Mr. Stellwagen, are you acquainted with Benjamin F. Conlin, Peter Conlin, and the other parties to this suit? A. I am not.

Q. Did you know William J. Florence during his lifetime? A. I did.

Q. State whether or not you knew Mr. Thomas J. Fisher.

180 A. He was my partner—also my father-in-law.

Q. What business were you and he engaged in—that is, the firm of Thos. J. Fisher & Co.—in what business? A. Real estate.

Q. Did you know William J. Florence during his lifetime? A. I did.

Q. Did you know John F. Ennis? A. I did.

Q. What was the business or profession of Mr. Florence, if you recollect? A. Mr. Florence was an actor.

Q. What was the business of John F. Ennis? A. He was a lawyer.

Q. Can you state whether or not about April or May of 1887 you had in your charge of the firm of Thos. J. Fisher & Co., in the real-estate business, lots 23 and 24, in John Alley's and Harvey L. Page's subdivision of lots in square 92? A. Sublots 23 and 24, in square 92?

Q. Yes. A. We did.

Q. Do you know to whom those lots were sold? A. I do.

Q. To whom were they sold? A. Wm. J. Florence.

Q. Sold through Thos. J. Fisher? A. For George E. Hamilton, trustee.

Q. Do you know in what capacity as trustee he was? What court? A. I do not.

Q. What time were those lots sold to Wm. J. Florence?
181 A. I can only answer that question from the record. The record is in my own handwriting. (Reading from book:) On the 7th of May, '87; recorded on the 11th of May, '87.

Q. Were there any negotiations prior to that time between your firm and Mr. Florence? A. Nothing but the negotiations for the purchase.

Q. Do you know when that was? A. About that same time.

Q. Now, what was the amount of the purchase—do you recollect? A. I can only answer that from the record. (Reads:) $15,712.50.

Q. Can you state from the record the terms of the purchase? A. $5,712.50 cash; $10,000 on time.

Q. And how was that balance secured? A. By deed of trust on the property.

Q. Who were the trustees?

—. John F. Ennis and Thomas J. Fisher.

Q. Both of those gentlemen are dead? A. They are.

Q. Do you know how long since? A. Mr. Fisher died about eleven years ago, and Mr. Ennis about five or six years, I should say. I am not certain—several years ago.

Q. Did I understand you to say there was a deed of conveyance from Mr. Hamilton to Mr. Florence, from your record? A. From my record.

Q. Does your record denote how those notes were payable? A. Payable in five years, with interest at six per cent. per
182 annum.

Cross-examination.

By Mr. DARLINGTON:

Q. Does your record show whether they were paid at the end of five years or earlier? A. I know nothing about that.

Q. Were those notes paid through your office? A. I have no recollection of their having been.

Q. Is it your recollection that the parties secured took those notes and attended to the collection of them? A. I have no recollection whatever about that. The custom is to turn the notes over to the party who sells the property.

Q. Have you any books which would show in this particular case? A. I do not know whether the ledger would show from the account with Mr. Hamilton, as trustee, whether those notes were collected for him or not. I do not think this ledger I have here would, as the date is five years before.

Q. As a matter of fact, the notes were paid off in about two years? A. I do not know.

Q. Did your firm represent Mr. Florence in relation to this property? A. We did.

Q. Was there ever any time known to you at which Florence was in danger of losing these notes for non-payment of the purchase-money? A. I do not know of any.

Objected to as immaterial, irrelevant, and incompetent, and that nothing was asked as to that in the examination-in-chief.

183 Q. You have no knowledge of any situation such as that? A. No, sir.

Redirect examination.

By Mr. MILLER:

Q. Did I understand you to say you were acquainted with Mrs. Ennis in his lifetime? A. I was.

Q. Do you know whether or not Mr. Ennis represented any one in the matter of these notes? A. He represented Mr. Florence.

Q. In the purchase of them? A. In all transactions relating to them.

Recross-examination.

By Mr. DARLINGTON:

Q. Mr. Stellwagen, was Mr. Hamilton the party secured for the payment of the purchase-money? A. I am unable to answer that.

Q. By the record you mean the books of your office? A. I mean my record—my own record. This was so long ago. I have no other recollection of it.

By Mr. MILLER:

Q. I understand you, Mr. Stellwagen, that your record shows you were acting as agent for Mr. Hamilton in the sale of these lots, and that through your firm the property was sold to Mr. Wm. J. Florence, for which he paid the purchase-money and gave a deed of trust. A. Yes.

The witness explained that the book to which he had referred was a record book in which were recorded all the sales, and
184 that other books submitted were the firm books, cash book, journal, and ledger.

Q. Which book would show when the $5,000 was paid? A. It is shown in our cash book. (Reads:) On the 3rd of May, 1887, Wm. J. Florence is given credit by check for $5,752.50. Now, by the ledger Mr. Florence was charged on April 22nd, 1887, with collector's certificates, $1.00, and on May 11, recording deed, $1.25; then, on May 17th, to Hamilton, trustee, $5,712.50, and then to John F. Ennis, $37.75, and those items balance that transaction; then the rent account commences, and $10 a month was collected for rent, and disbursements were made for taxes, etc.

Mr. DARLINGTON:

Q. Did you make disbursements for interest? A. I see no disbursements, except for taxes.

Q. Your books do not go down so late as interest payments? A. No. The books were just of that date.

EDWARD J. STELLWAGEN,
By T. PERCY MYERS, *Examiner.*

GASHERIE DE WITT, being duly sworn, testifies as follows:

By Mr. MILLER:

Q. Will you please state your full name, residence, and occupation. A. Gasherie De Witt; residence, Washington; business, hotel manager.

185 Q. Mr. De Witt, I will ask you to state whether you are acquainted with Benjamin F. Conlin, Peter Conlin, and Mrs. Coveney, formerly Mrs. Florence. A. I do not know any of the parties. I know Mrs. Florence by sight; that is all.

Q. Will you please state what business you were engaged in in 1887, about March, April, May, and June? A. I was clerk at Willard's hotel.

Q. Did you know Wm. J. Florence during his lifetime? A. I did; yes, sir.

Q. Did you know his wife? A. Only by sight, and as being a guest at the hotel.

Q. At what hotel? A. Willard's.

Q. Do you know what business Mr. and Mrs. Florence followed? A. Yes, sir; actor and actress.

Q. Will you please state if you ever heard Mr. Florence speak of purchasing property or looking at property in this city?

Objected to as being irrelevant to the issue in this case, and on the further ground that verbal conversations or testimony in regard to them are inadmissible in regard to any title to real estate.

A. I recollect a casual conversation with Mr. Florence, and I think the head clerk at Willard's.

Q. Please state slowly what Mr. Florence said at that time as to purchasing or looking at property.

186 Objection repeated, and it is agreed that this objection shall apply to all questions and answers on this subject.

A. I could not, of course, twelve and a half years later, give the exact words, but I recollect he said that they had been out or were going out—one or the other—for a carriage ride, with somebody—parties to me now unknown, and had been or were going to look at some real estate.

Q. Did he tell you whereabouts that real estate was situated? A. I am not sure of that. It is beyond my recollection, but I have an idea it was somewhere in this section of the city.

Q. What section? A. The northwest section.

No cross-examination.

GASHERIE DE WITT,
By T. PERCY MYERS, *Examiner.*

GREGORY I. ENNIS, duly sworn, testified as follows:

By Mr. MILLER:

Q. Will you please state your full name, residence, and business? A. Gregory I. Ennis; residence, 1136 Eighth street N. W., this city. I am in the insurance business.

Q. Will you please state whether or not you are acquainted with Benjamin F. Conlin, plaintiff in this suit, and Peter Conlin, Mary Jane Wiard, and others, the defendants in the present suit?

187 A. I am not acquainted with them; no, sir.

Q. Did you know Wm. J. Florence during his lifetime? A. I have met him in my brother's office.

Q. What was your brother's name? A. John F. Ennis.

Q. What was his business? A. He was a lawyer.

Q. In the supreme court of the District of Columbia? A. Yes, sir.

Q. Can you state whether he is living, or whether dead, and when he died? A. He died three years ago this month.

Q. Did you ever see Mr. Florence at the office of your brother? A. Frequently. No, I cannot say frequently; I have seen him there several times.

Q. Can you say up to what time prior to the death of your brother? A. I really could not state any time.

Q. Where was your brother's office at that time, Mr. Ennis? A. The same building you now occupy—486 La. Ave.

Q. Will you please state whether or not you have seen your brother write, and if you are familiar with his handwriting? A. I have and am.

Q. I would ask you to please look at that book, and state if you have seen that book before, and whose handwriting that is. (Hands book to witness.) A. All that writing looks very much like my brother's handwriting.

188 Q. Do you know whether it is or not? A. I can say it is.

Q. What would you call that book of his? A. Well, it is a kind of scrap book, containing memoranda, etc.

Q. Did you ever see that book before; and, if so, where? A. I have seen it at his office.

Q. Are you administrator or executor of his estate? A. I was administrator; yes, sir. I think I had this book in my possession.

Q. Can you state positively whether you had it in your possession as administrator of the estate? A. I can state positively I had.

Q. I would ask you to look on page 76 of the book, at the words "See Fisher & Co. Florence purchase," and state in whose handwriting that is. A. That is my brother's handwriting, evidently.

(Page 76 is headed April, 1886, but it is preceded and followed by pages headed April, 1887, and it is conceded that the entry in question was probably made in 1887.)

Q. Now, I would ask you to look on page 83 of the same book, June, 1887, and tell me in whose handwriting are the following words: "Send deed to Florence." A. That is the same handwriting.

Q. Whose handwriting? A. My brother's.

Q. Now, I would ask you to look at page 84, under the month of June, no year being mentioned, but the preceding page and the following page being headed June, 1887, and tell me in whose handwriting are the following words: "Sent deed to Florence."

189 A. That is the same handwriting.

Q. Your brother's—John F. Ennis? A. Yes, sir.

Q. Now, I would ask you, under the month of June, 1887, on page 85 of the same book, to look at the words "Florence deed Liber 1258," and tell me in whose handwriting are those words. A. The same, my brother, John F. Ennis.

No cross-examination.

GREGORY J. ENNIS,
By T. PERCY MYERS,
Examiner in Chancery.

ANNA TERESA FLORENCE COVENEY, being duly sworn, testified as follows:

By Mr. FETTRETCH:

Q. Mrs. Florence, you remember being examined in this case at New York last spring? A. I do.

Q. Do you remember at that time stating that a transaction which you testified about in relation to a payment of seven thousand or seven thousand five hundred dollar- to Mr. Florence, or the giving him that amount of money, stating that it was while Christine Narini was in your service and before she was married? Do you remember making that statement? A. Yes, sir.

Q. Have you any explanation which you wish to make in regard to it? A. Did I say *before* she was married?

190 Q. Yes. Your testimony was, this transaction took place while Christine Narini was in your service, before she was married? A. Yes; I have a statement to make. I think I made a mistake about that. It was after her marriage.

Q. She had lived with you as your maid up to the time of her marriage, in 1883? A. Yes; eleven years.

Q. Did Mrs. Narini continue in your service in any capacity after her marriage? A. Yes, sir; she did.

Q. In what capacity did she do anything for you or was she employed by you? A. She was my dressmaker—private dresses and stage dresses.

Q. And continued as such up to what time? A. For four or five years.

Q. During that period of four or five years after her marriage, was she frequently at your place of residence? When you were in the city of New York, and during the year 1887 or any part of that year, were you at the Fifth Avenue hotel? A. Yes; in that year we were registered at that hotel.

Q. At the Fifth Avenue hotel? A. Yes, at the Fifth Avenue hotel.

Q. And during these periods when you were at the Fifth Avenue hotel, was Mr. Florence there? A. Decidedly there.

Q. And during the period when you were at the Fifth Avenue hotel, was Mrs. Narini in the habit of going there? A. Daily.

Q. And was she the person to whom you referred in your
191 former evidence as the person who went and got the box from the office of the hotel and brought it to you? A. Yes, sir; she is the person.

Q. Have you any correction to make in regard to the amount of money which you gave Mr. Florence at that time? A. Yes, sir.

Q. What correction have you to make? A. It was not $7,000; it was $5,712.50. That was the exact amount.

Cross-examination.

By Mr. DARLINGTON:

Q. Mrs. Coveney, when did you first discover that you had made a mistake in your testimony? A. Just a few days afterwards. I was rattled then, but afterwards I sat down and found out my mistake, as I have in many things.

Q. How did you happen to find these mistakes? A. Because I thought of moneys, and we counted over my money—what I had got out, what I had in the box, etc.—and found I had made a mistake.

Q. You say *we* counted out the money. A. No; I mean I counted it out. There is no *we* about it. No one helped me to count it out. I knew there was an error; I knew there was not so much as $7,000.

Q. Do you mean to say that you had not so much at that time? A. Oh, yes; I had more than that amount of money at that time, but I gave him $5,712.50.

Q. Had any one talked with you about your testimony? A. No, sir; not a soul.

Q. You simply went home and thought it out? A. Yes, sir; I just sat down and thought about it.

192 Q. What enabled you to remember the 50 cents? A. I found a book with lots of things in it.

Q. Where is that book now? A. Oh, that is a private book. No one can see that book.

Mr. DARLINGTON: I object to all testimony relating to or based upon this book unless the book is produced.

Q. Do I understand that you found out from this book? A. No, sir; not from the book at all. I was looking over bills and papers and things.

Q. Did Mrs. Nernini ever remain in your employ—that is, in the same building with you after her marriage? A. She never was a maid to me after her marriage, but she was with me daily and weekly four or five years after her marriage, working for me as a dressmaker.

Q. Let me read you a part of your testimony at the last session. See if this is correct:

"Q. Do you remember when Christine Nerini was married? A. It was about 1883 that she was married, and from the Fifth Avenue hotel.

Q. And she then left your employ? A. Yes, sir.

Q. Has she ever been employed by you since then? A. No; only as a dressmaker.

Q. She has an establishment and has worked for you at that place, has she not? A. Yes, sir.

Q. Never at the hotel? A. No, sir; never."

193 Q. Is that correct? A. No, sir; it is a mistake.

Q. Did you not know at the time whether she had worked at the hotel or not? A. I did not think it was necessary to say that she worked for me at the hotel or that she did not.

Q. But you did say she did not work for you at the hotel. A. Then I told a fib, for she did work for me four or five years after her marriage, both at the hotel and at home, as dressmaker.

Q. Have you read your testimony since you gave it? A. No, sir.

Q. Since you gave it in New York? A. No, sir.

Q. How did you know then about it? A. Well, everything. I knew that many things were not correct. For instance, I did not know and could not tell that day if we were in the hotel in 1887 until I went over to see Mr. Vilas, and he looked over the books of the Fifth Avenue hotel and said, "Yes, madam, you were here in 1887."

Q. When was that? A. The day we left Mr. Fettretch's office in New York.

Q. You testified you went to the Fifth Avenue hotel to see if you were registered there in 1887? A. Yes, sir; I was not sure whether we were there or whether we were in Europe, and he showed me his books and we were there.

Q. Were there any other mistakes? A. Yes; there was an-

194 other one. When the property was bought—in 1887. Mr. Florence could not pay the first mortgage on the Washington property, and I loaned him the money, and that was the same year.

Q. You loaned him the money to pay the mortgage? A. Yes, sir.

Q. And that was in 1887? A. Yes, sir; at the time the property was bought.

Q. Was there ever more than one mortgage on it? A. I do not think so. I know he was anxious to pay that one, and I lent Mr. Florence the money. Mr. Florence was to pay this mortgage money at such and such a time.

Q. You used the word promissory note some time ago; what did you mean by that? A. I do not know. When you have a mortgage to meet at a certain time, is that it? And that was the time when Mr. Florence received word: "Send on the mortgage money, or you lose your property." Well, that was a certain date——

Q. That was the night that John McCullough, Larry Jerome, and John Herscher were at your place? A. Since then it comes to me that Mr. Connor, of the St. James hotel, was there.

Q. These four gentlemen were there? A. Yes, sir; they were in the room and were smoking and looking out of the window, and

when Christine went down for the box and we were at the table getting the money the gentlemen, for politeness, I suppose, turned their backs.

Q. Is Mr. Connor living? A. No, sir; I wish he was.

Q. Mr. McCullough afterwards lost his mind? A. Yes, sir; he was a little out of his head.

195 Q. Did not he go to an insane asylum and die there? A. I don't know anything about that.

Q. Was not he in an insane asylum before 1887? A. Mercy! No; that was a mistake. It was long after that.

Q. Our information, Mrs. Coveney, is that Mr. McCullough had been in the insane asylum for several years, and was actually dead before 1887. Do you think that was a mistake? A. Yes; that was a mistake.

Q. Anyhow, he was present when this loan was made? A. Yes; I should say so.

Redirect examination.

By Mr. MILLER:

Q. Mrs. Coveney, I want to ask you a few questions, but please do not answer them until they are asked. A. I will try not; but I am very impetuous, and this is all new to me.

Q. You say this is all news to you? A. I mean *new.*

Q. Have you ever been a witness before this matter? A. No; I have never been a witness before this.

Q. You speak in your testimony of a book. Will you please state whether that book had anything to do with the loaning of this money or the handing of this money to Mr. Florence? A. No; it did not.

Q. But simply contained accounts and items of other business? A. Yes; moneys and things I had in the box. It was not a book at all; it was just a paper formed like a book.

196 Q. You speak of a mortgage at this time. Can you state whether or not there was any mortgage upon the property at the time you gave Mr. Florence this money? A. Yes.

Q. Do you know what a mortgage is? A. When you can't meet a bill you mortgage your house and it is taken from you. Is that the idea. When your house is mortgaged and it is taken from you? Is that what you mean?

Q. When you say a mortgage, do you mean the money was given for the purchase of the property? Can you state whether or not the money which you gave your husband was for the purpose of paying the first installment on the purchase price of the property or whether it was for the payment of the mortgage?

Mr. DARLINGTON: I object because the witness has repeatedly said it was to pay the mortgage.

A. I cannot tell now whether it was a mortgage or a first installment. Whatever it was for, I paid the money.

Q. You are positive that it was in 1887 when the property was bought that you gave your husband this amount of money? A. Yes; to pay on the mortgage or the installment, or whatever it might be.

Q. Mrs. Florence, sometimes we have to ask ladies questions which they might at other times reasonably object to, and that is the question of age. I would like to know how old you are, and have it put down upon the record. A. I will not tell that. That is personal.

Q. You spoke a little while ago and said that you had been sick and that your mind and memory were not as good as they
197 might be. A. Do you mean to say I am crazy? No; what I said was I had not very good recollection of dates and things, as many thousands of people have, but it has nothing to do with my mind being upset, and nothing to do with my age. I have never been sick a day since my husband's death—sick enough to be in bed; and I can prove that by my doctor in New York.

Mr. FETTRETCH:

Q. Do you object to stating your age, Mrs. Coveney? A. Yes; I do. What good does my age do?

Q. We might have some reason for asking it, but we will waive it if you object to it.

Mr. MILLER:

Q. Can you give us within five years of your age? A. Well, I am 65 years old, gentlemen.

Recross-examination.

By Mr. DARLINGTON:

—. Mrs. Coveney, I want to see if I have this matter quite straight. If I understand this matter, Mr. Florence had bought this property and paid some money on it, and was liable to lose this money unless the rest was paid. You gave him the money to pay it off. A. Yes.

Q. And since the time you loaned him the money there has been nothing due on the property? A. Yes, sir; it was all settled up.

ANNA TERESA FLORENCE COVENEY,
By T. PERCY MYERS, *Examiner*.

198 Mrs. CHRISTINE NERINI, called, sworn and examined.

By Mr. FETTRETCH:

Q. You were examined as a witness in this case once before? A. Yes.

Q. Up to the time of your marriage, which occurred in 1883, you were, and for some years prior to that date had been, in the employ of Mrs. Florence as maid? A. Yes.

Q. Subsequent to your marriage, did you do any work for Mrs. Florence? A. Yes.

Q. And for about how long a period? A. About four, or five, or six years.

Q. What was the work you did? A. Dressmaking.

Q. Were you frequently at the Fifth Avenue hotel, where Mrs. Florence resided, in 1887? A. Yes, sir.

Q. During the year 1887, did you frequently see Mrs. Florence? A. I had to go there for fitting quite often.

Q. And did you remain there longer than simply to fit? A. Yes, sir; sometimes I spent the afternoon.

Q. And where did she reside during the year 1887, when you did work for her? A. At the Fifth Avenue hotel, in the city of New York.

Q. Do you remember any occasion when any telegram was
199 said to have come from Mr. Ennis? Do you remember being present when any telegram was said to have come from Mr. Ennis, of Washington? A. I do.

Q. State what occurred, as near as you can recollect, on that occasion. A. Well, I remember being there, when Mr. Florence came in and was excited over something he had received. I do not know what they were about in the parlor, but madam asked me to go back downstairs and get her a box.

Q. Had you up to that time, and before that time, been sent for that box?

Objected to by Mr. Darlington as leading.

A. Yes, sir; many times.

Q. When Mrs. Florence asked you to go for the box to the office of the Fifth Avenue hotel, did you know what box was referred to? A. Yes, sir.

Q. What box was it? A. The box where she kept her money.

Q. What did you do after she made that request? A. I went and got it, and madam went and got out the money and gave it to Mr. Florence.

Q. Do you remember the amount? A. No; I could not remember the amount.

Q. You remember the fact of going for the box and bringing it to her? A. Yes, sir.

Q. What do you remember seeing her do with the box
200 after you brought it to her? A. She opened it with Mr. Florence.

Q. Do you remember any persons who were present on that occasion? A. There were a few there, but I could not remember their names.

Q. Were they persons you had seen there before? A. Yes; I had seen them lots of times.

Q. Were they gentlemen or ladies? A. Gentlemen.

Q. Had you, prior to the time that Mrs. Florence requested you to go down for this box, ever heard Mr. Florence speak of any Washington property? A. Yes; many times. I had heard him speak of it even before I was married.

Q. What did you hear him say, prior to your marriage, of Washington property? A. Well, speaking about it, he would like to get it, whether it was well or not well to put money in such a place.

Q. Do you remember, Mrs. Nerini, of any time when you were in the employ of Mrs. Florence as a maid, and before yonr marriage, being in the city of Washington with Mr. & Mrs. Florence? A. Yes, sir.

Q. And do you remember going with Mr. and Mrs. Florence to look at any property? A. Yes, sir.

Q. What was the fact, did you go or not? A. Oh, we went; Mr. & Mrs. Florence and Mr. Roessle.

Cross-examination.

Mr. DARLINGTON:

201 Q. That is, you went out to look at this property? A. I think I did.

Q. About how long before you got the box that you testified about had Mr. Florence owned this property? A. Oh, I do not know. I remember, though, it was while I was with them he spoke about it.

Q. And you and Mr. and Mrs. Florence and Mr. Roessle went out to look at the property. Was that before or after he bought the property? A. That must have been before.

Q. When did you hear that he had bought property here in Washington? A. When they bought it that year.

Q. What year was that? A. 1887.

Q. How long before this box transaction? A. Oh, it was the week I was there. I could not tell you the date. That was in the spring after the season was over.

Q. Were you there over a week? A. I went there often to fit madam.

Q. What did you mean when you told us that it was during the week? A. It must have been during the week, because I could not go on Sunday to fit her.

Q. When were you last in Washington before today? A. It was with Mr. and Mrs. Florence.

Q. Where did you stop the last time you were here in Washington before today? A. At the Arlington.

Q. Was that before or after your marriage? A. Before.

202 Q. And that was in 1883? A. I do not know. It was before I was married.

Q. You were married in 1883? A. Yes, sir.

Q. Was it at that time, namely, your last visit before your marriage, that you and Mr. & Mrs. Florence and Mr. Roessle went out to look at this property? A. I could not tell whether it was the last time or the time before the last.

Q. Did you hear this telegram read that you speak of? A. No, sir; but I heard Mr. Florence say he had to meet a very important payment.

Q. You were there at that time? A. Yes, sir.

Q. Mr. Florence got a telegram which said he must pay the balance or *or* would lose what he had already paid? A. Yes; I heard that.

CHRISTINE NERINI,
By T. PERCY MYERS, *Examiner.*

ANNIE TERESA COVENEY recalled.

By Mr. FETTRETCH:

Q. Do you personally know anything about the steps usually taken for the purpose of real estate? A. No, I do not.

Q. Do you know what papers are usually prepared for the making of a contract for the purchase of real estate and for the carry-
203 ing of that purchase into effect? A. I know that — buying a house you have to draw papers. Of course, you can't buy a house without some title or deed or something.

Q. Do you know the difference between a contract which provides for the payment of the purchase price of a piece of real estate partly in cash and partly a mortgage, and a mortgage? A. Yes; I think I know the difference, and yet I do not know how to answer it. I am not a real-estate man.

Q. When you say that Mr. Florence told you he wanted this money to pay off a mortgage (Witness: Yes, that sounds like Mr. Florence), do you mean to say that you now remember whether it was a mortgage or an installment on the price of the property? A. Well, you see, Mr. Fettretch, to tell the truth, I don't know whether it was a mortgage or an installment, but I think it was a mortgage.

Q. What did you know about it at the time? A. I did not know anything about it, except Mr. Florence bought a piece of property in Washington.

Q. Did you know anything about it except that he said he wanted money to pay something on a mortgage or something on the property at Washington?

Mr. DARLINGTON: I object to this question as leading, and further that it is an effort to educe an answer contrary to all the witness has previously said. I submit that there can be no answer to this question at this stage of the examination which can be received as evidence.

A. That is all I know about it.

204 By Mr. MILLER:

Q. Mrs. Florence, you recollect your husband purchasing this property, do you not? A. Yes, sir.

Q. Do you know whether or not he paid down any money on account of that purchase? A. In the first instance?

Q. Yes. A. I think I paid the first.

Q. To whom did you pay it? A. I mean this property in Washington.

Q. Yes; I understand *in* was this property in Washington. A. I

think I gave Mr. Florence the money for this first installment or mortgage or whatever you call it.

Q. Now, how much money did you give him when he first bought the property? A. I gave him that sum.

Q. How much? A. Five thousand, seven hundred and twelve dollars and fifty cents.

Q. Was that at the time that Mr. Ennis telegraphed on? A. It was that very afternoon.

Q. After that did you give him any other money, after you gave him the first money you have spoken of? A. Do you mean for this property?

Q. Yes, madam. A. Four or five times.

Q. How much did you give him at each time? A. Two thousand, three thousand.

Q. Any more? A. Two thousand, three thousand, and
205 fifteen hnndred at one time.

Q. Did he tell you for what purpose he wanted it? A. No; he did not.

Q. How did you know it was to be applied to this property in Washington? A. Yes; it was for the Washington property. He told me that he would lose it if I did not help him to pay it up. He said, "I have lost eighty-five thousand dollars, Annie, in stocks," and I said, "Well, that is, you want me to help you pay this," and he said, "That is just what it means."

Q. That was after you gave him the first money? A. Yes; that was after I gave him the first money. I cannot say whether it was for an installment or a mortgage.

Q. Do you know what your husband did with the money? A. Yes; he kept sending it on to Mr. Ennis, to pay something on this property in Washington.

Q. You did not see the money sent on? A. No; I took my husband's word for it; I did not follow him down the steps and watch him to see where he sent it. His words were, "This goes to Ennis."

Q. Mr. Ennis attended to all your husband's business while he was alive? A. Yes, sir; John F. Ennis.

Q. Do you know whether Mr. Ennis attended to your husband's matters here in Washington? A. He attended to my husband's Washington business, and not to all his business.

206 Cross-examination.

By Mr. DARLINGTON:

Q. What business did your husband have in Washington? A. It was this Washington business.

Q. It was this Washington real estate that we have been talking about? A. Yes, sir.

Q. I wish you would tell us again what this telegram was which your husband got from Mr. Ennis, and which led to your making this first advance of money. A. It read, "Dear Billy, send on mortgage money, or you lose your property. Hurry up, old man."

Q. You have testified; if I understand you, that your husband told you unless you helped him out he would lose what he had already paid? A. Yes, sir.

Q. And then you let him have five thousand seven hundred and twelve dollars and fifty cents? A. Yes, sir.

Q. After that you let him have two thousand dollars more? A. Yes, sir.

Q. The- three thousand dollars? A. Yes, sir.

Q. Then fifteen hundred? A. I am not sure whether it was twelve hundred or fifteen hundred.

Q. What intervals between them? A. Well, then we were acting, you know. You see, I have to tell you something in order to get at it. There would be four months, or five months, or two months, or something like that, between them.

207 Q. For example, how much time was there between this first advance of five thousand seven hundred and twelve dollars and fifty cents and the second advance of two thousand? A. Well, I don't know; about three months.

Q. And then about how long between the two thousand and the three thousand advance? A. Well, that would be about the balance of the season.

Q. How long would that be? A. Well, our season generally ended about the first of April or the first of May.

Q. The season ended some time between the first of April and the first of May? A. Yes, sir; never later.

Q. How long was it between the three-thousand-dollar advance and this third advance of twelve or fifteen hundred dollars? A. Well, it would be about five or six months, though I could not tell exactly.

Q. So that these four advances were running along about a year and a half? A. No; it was not so long as a year and a half.

Q. You say the first one was in the spring of 1887, and the second was along in April or May; that must have been a year afterwards. A. No; it was not quite a year.

Q. And the third one was five or six months after the
208 second one? A. Not quite that, but in that neighborhood.

ANN TERESA FLORENCE COVENEY,
By T. PERCY MYERS, *Examiner.*

Mr. MILLER: Now, Mr. Darlington, I offer in evidence the bill of complaint of Martin F. Morris *vs.* Margaret Merrick *et al.*, Eq. No. 9727, the bill of complaint filed December 31st, 1885. Also the decree in same cause appointing George E. Hamilton, trustee, to make sale of the property mentioned in the bill of complaint, which includes the property in question; the trustee's report of George E. Hamilton, trustee, and the agreement of ratification in the same cause, which was filed May 7th, 1887. Also the order of ratification of sale in the same cause, filed May 7th, 1887.

Mr. DARLINGTON: May I ask the object of this?

Mr. MILLER: The object is to show that the property in question

was sold by Mr. Hamilton, the trustee in that cause, and the terms of sale upon which it was sold—that is, so much cash and the balance in a note in his favor.

Mr. DARLINGTON: I concur that this property was sold by Mr. Hamilton in the case in question, and that the aggregate of the purchase-money was $15,712.50 and that the cash payment was $5,712.50; also that for the remaining ten thousand dollars Mr. Florence's note, dated April 22nd, 1887, and payable five years thereafter, with interest, was taken, with the privilege of making payments of sums not less than five hundred dollars in anticipation of the maturity of the note. Will that agreement obviate embarrassing our
209 record with these papers in the earlier suit?

Mr. MILLER: Yes, if you agree that the ten-thousand-dollar promissory note was secured by deed of trust.

Mr. DARLINGTON: I admit that.

It is stipulated by counsel for the respective parties that the examiner may sign the depositions of the witnesses.

T. PERCY MYERS,
Examiner in Chancery.

210 In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } Equity. No. 16225.

Met at the office of J. J. Darlington, 410 Fifth street, in the city of Washington, on the 25th day of January, 1900, at 3.30 o'clock, pursuant to agreement between the solicitors, to take testimony on behalf of the complainants in the cross-bill.

By consent of counsel the testimony shall be taken down stenographically and reduced to typewriting.

Present: W. J. Miller for complainant in cross-bill; Joseph J. Darlington for defendants in cross-bill.

211 MARTIN F. MORRIS, a witness of lawful age called on behalf of the complainant in cross-bill, being duly sworn, testified as follows:

By Mr. MILLER:

Q. Mr. Morris, I believe you have already stated your full name and your residence; if not, I will ask you to state them. A. Martin F. Morris; residence, 1313 Massachusetts avenue, this city.

Q. You were formerly a member of the bar? A. Formerly a member of the bar in this District, and associate justice of the Court of Appeals.

Q. I believe, Mr. Morris, you were the complainant against Miss Margaret Merritt, in equity cause No. 9757 of the supreme court of the District of Columbia, as to the partition and sale of lots 23 and 24. A. Yes; I was a complainant in that suit.

Q. That relates to the sale of lots 23 and 24, in Alley & Page's subdivision, square 92? A. Yes.

Q. Can you state who was the trustee in that matter? A. The trustee to sell the property, I believe, was Mr. George T. Hamilton.

Q. Do you know through whom that property was sold and who became the purchaser of it? A. It was sold through the firm of Thomas J. Fisher, and the purchaser was Mr. William J. Florence.

Q. Will you please state who Mr. William J. Florence was, if you know? A. I do not think I have ever met Mr. Florence, but
212 I have always understood by reputation that he was a very distinguished actor.

Q. Was the transaction, that you know of, closed up by you? A. I think so.

Q. Do you know whether or not Mr. Florence had any persons to represent him there at the time? A. I think he was represented throughout the whole transaction by Mr. John F. Ennis, a member of the bar of the District of Columbia.

Q. You knew Mr. Ennis well? A. I knew Mr. Ennis very well.

Q. Do you know whether he is living or dead? A. He is dead.

Q. Do you know through whom and how the purchase-money of that property was paid? A. I do not at present recall distinctly. So far as I may give my impression, it would be that it was by check of William J. Florence, delivered either to Mr. Hamilton or myself, by Mr. John F. Ennis.

Cross-examination.

By Mr. DARLINGTON:

Q. Mr. Morris, I observe that the deed of trust securing the deferred purchase-money contained a provision that Mr. Florence might anticipate the payments. Is it not a matter of fact that he did anticipate the payments? A. Yes.

Q. Was there at any time any occasion when Mr. Florence was pressed or liable to be sold out or forfeit what he had already
213 paid? A. I have no recollection of anything of that kind, and I do not think there ever was.

Q. The fact that the debt was paid before it was due—would that refresh your recollection in so far as you could say that you ever did press Mr. Florence and threaten foreclosure of sale? A. I am very sure that we never had occasion to press him. I have certainly no recollection of it.

Mr. MILLER: I object to the question and answer as not brought out in the examination-in-chief, but I will ask you this question, Mr. Morris:

Q. At the time that he purchased the property Mr. Florence, I believe, was to pay one-third of it cash, the sum of $5,712.50. Do you recollect whether or not Mr. Florence was called upon to comply with the terms of sale? A. I have no recollection further than this, that the purchase-money was something over fifteen thousand

dollars, and that all over ten thousand dollars was paid in cash, and, I think, very soon after the purchase—I presume that, although I do not know positively about it—in the usual time.

Q. That would be shown by the appointment of a trustee?

Mr. DARLINGTON: Objected to. It is already shown by the complainant's own testimony—that introduced by Mr. Stellwagen—that the entire cash purchase-money was paid by one check of William J. Florence, there having been no precedent deposit or anything of that sort.

214 Mr. MILLER: I believe that is all.

MARTIN F. MORRIS,
By T. PERCY MYERS, *Examiner.*

It is hereby stipulated between counsel that the examiner may sign the deposition of Judge Morris without recalling him for that purpose.

It is stipulated between counsel for the respective parties that Mr. George E. Hamilton, a witness who is prevented from being present at this session by reason of indisposition, would testify, if present, that he, as trustee in equity cause No. 9757, sold the property in controversy to William J. Florence for $15,712.50; that the said Florence paid $5,712.50 in cash, and secured the remaining $10,000 of purchase-money by his promissory note and deed of trust, both dated on or about April 22, 1887, which was the time of the sale, and the said deed of trust contained a provision enabling the said Florence to anticipate his payments; that on or about October 28th, 1887, Florence made a payment of $5,000 on his said promissory note, under his said power of anticipation, and that on the 17th day of October, 1888, he made a further payment of $1,000 by like anticipation, and that he paid the residue of the said note some time in the year 1889, the date of which he cannot state, said last payment, also, being by way of anticipation, under the right reserved; that none of these payments were compulsory, and that there was no time or occasion when the said payments were or could have been demanded of said Florence prior to the time when they
215 were made; that throughout the said transaction the late John F. Ennis acted as the attorney and representative of Mr. William J. Florence, and that he, the said John F. Ennis, was a member of the bar of the supreme court of the District of Columbia at the time.

Testimony on behalf of the complainants in the cross-bill is closed, except the deposition of Charles N. Vilas, which deposition it is agreed may be taken in New York when the testimony in that city is taken of the defendants in the cross-bill, provided the defendant shall take any testimony there, and, if not, then within thirty days from this date.

The defendants in the cross-bill, as a part of their evidence, but for convenience and by agreement at this time, here offer in evidence a transcript from the records of marriages in the city of New York, showing the marriage of the witness Christine Nerini to Joseph

Nerini on the 16th day of May, 1883, marked "Defendants' Exhibit No. 1," and a certificate of the death of the actor, John H. McCullough, from the health office of the city of Philadelphia, marked "Defendants' Exhibit No. 2," the right being reserved to the solicitor for the complainant in the cross-bill to object to either of these certificates at any time before the testimony closes, if, upon inquiry, they shall be advised that the persons therein named are not the witness Christine Nerini or the actor, John H. McCullough, referred to in the testimony of the complainant, and the right, also,
to further object at the hearing to the competency, admissi-
216 bility, or pertinence of the date of the said marriage or of the
said death, and with further right to object to the said certificate if, upon inquiry, it shall be found that any of the statements therein contained are incorrect in any particular.

(Copy.)

DEFENDANTS' EXHIBIT No. 1.

NEW YORK, *Apr.* 20, 1899.

A transcript from the records of the marriages reported to the health department of the city of New York, county of New York.

CITY OF NEW YORK,

State of New York.

No. of certificate, 460/7.

I hereby certify that Joseph Nerini and Christina Farinet were joined in marriage by me in accordance with the laws of the State of New York, in the city of New York, this 16th day of May, 1883.

Signature of person performing the ceremony:

FRANKLIN EDSON.

Witnesses to the marriage:

—— ——.

Date of marriage, May 16, 1883; groom's full name, Joseph Nerini; residence, New York; age, 40; color, white; widowed; birthplace, Italy; father's name, Domenico; mother's maiden name, Madeline Germano; number of groom's marriage, 2nd; bride's full name, Christina Farinet; residence, New York; age, 36; color, white; widowed; maiden name, if a widow, Vitali; birthplace, Italy; father's name, Victor Vitali; mother's maiden name, Margaret Rivez; number of bride's marriage, 2nd; name of person performing ceremony, Franklin Edson; official station, mayor;
217 residence, —; date of record, 5, 21, 1883.

A true copy.

C. GOLDERMAN,

[SEAL.] *Secretary pro Tem.*

NOTICE.—In issuing this transcript of record, the health department of the city of New York does not certify to the truth of the record transcribed. The seal of the board of health attests only the correctness of the transcript, and no inquiry as to the facts reported has been provided by the law.

(Copy.)

DEFENDANTS' EXHIBIT No. 2.

Health office, registration office; room 517, city hall.

No. 8916.

PHILADELPHIA, PA., *May* 1, 1899.

To all whom it may concern:

This is to certify that the following is a correct copy of the certificate of the decease of John H. McCullough, filed in this department as directed by the State law:

1. Name of deceased, John H. McCullough.
2. Color, white.
3. Sex, male.
4. Age, 53 years.
5. Married or single, married.
6. Date of death, Nov. 8th, 1885.
7. Cause of death, cerebral thrombosis due to specific causes.

218

H. ENGEL M. D.,
Residence, 507 *Franklin St.*

8. Occupation, actor.
9. Place of birth, Ireland.
10. When a minor, { Name of father, —— ——. Name of mother, —— ——.
11. Ward, 18th.
12. Street and number, 219 E. Thompson St.
13. Date of burial, November 12th, 1885.
12. Place of burial, Monument vault.

JNO. VAN AKEN,
Undertaker, 1211 *Palethorp St.*

CHAS. H. HESUTIS,
Health Officer.

[SEAL.] J. V. P. TURNER,
Chief Registration Clerk.

219 *Deposition of Benjamin F. Conlin.*

Filed March 9, 1901.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } No. 16225. Equity.

At the execution of the foregoing commission issued out of the supreme court of the District of Columbia, and to me directed, empowering me to examine witnesses in the above-entitled cause, I, Thomas F. Daniels, the commissioner in the said commission named, first duly took the following oath, viz:

"I shall according to the best of my skill and knowledge, truly, faithfully, and without partiality to any or either of the parties, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, orally, so help me God."

I then proceeded on the fourth day of January, in the year of our Lord nineteen hundred and one (1901), at the office of Messrs. Fettretch, Silkman & Seybel, Times building, in the city of New York and State of New York, at four o'clock p. m., under the said commission, pursuant to arrangement between the counsel for the respective parties, and in the presence of the counsel for the
220 respective parties, that is to say—James F. Smith, Esq., of counsel for defendants to cross-bill of Annie Teresa Coveney, and Joseph Fettretch, Esq., of counsel for Annie Teresa Coveney—to take the following deposition:

BENJAMIN F. CONLIN, a witness of lawful age produced on behalf of all parties to the cause, being by me first duly sworn according to law, being examined orally by counsel, makes oath, deposes, and says as follows—that is to say (the counsel for the parties having first consented that the testimony taken under the said commission should be taken down stenographically and reduced to typewriting, and that the commissioner shall sign the deposition on behalf of the witness):

Direct examination.

By Mr. SMITH:

Q. Please state your name, Mr. Conlin. A. Benjamin Franklin Conlin.

Q. You are the complainant in this suit, are you not? A. Yes, sir.

Q. And a brother of the late William J. Florence? A. Yes, sir.

Q. Did Mr. Florence leave any direct heirs—that is, did he leave any children? A. No, sir.

Q. Did he leave any brothers and sisters? A. Yes, sir.

Q. Who were they? A. Alive at the time of his death?

221 Q. Yes; state those who survived him, his brothers and sisters. A. Edward B. Conlin, John Conlin, Peter Conlin, and Benjamin F. Conlin.

Q. Brothers? A. Brothers.

Q. Were there any brothers or sisters deceased at the time of his death? A. Winifred Tooker.

Q. Did he leave any sisters surviving him? A. Mary Jane Wiard.

Q. Did he leave any other sisters? A. No, sir.

Q. Have any of the brothers or sisters died since your brother William J. Florence? A. Yes, sir; brother Edward died.

Q. Did any of the brothers or sisters who predeceased your brother William J. Florence leave any children? A. Yes, sir.

Q. What are the names of those children? A. Children of Winnifred Tooker—Joseph H. Tooker, Virginia T. Seggerman, Winifred Cooke, and Charlotte Louise Sullivan.

Q. Is John Conlin dead? A. Yes, sir.

Q. What children did John Conlin leave? A. John Conlin left Frances Cecilia Conlin, Georgiana Clare Conlin, Charlotte L. Lisiecki, and Mary Jane Conlin.

Q. What children did Edward B. Conlin leave? A. He left a daughter, Nellie Maddox.

222 Q. Nellie Conlin, daughter of Edward B. Conlin, was married to Harvey L. Maddox, was she not? A. Yes, sir.

Q. What became of her? A. She died.

Q. Did she leave any heirs? A. An infant daughter.

Q. What is the name of the daughter? A. Frances Lindley Maddox.

No cross-examination.

THOS. F. DANIELS, *Com'r*,
[SEAL.] For BENJAMIN F. CONLIN.

223 *Deposition on Behalf of Complainant.*

Filed April 16, 1901.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN ET AL.
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

NEW YORK, *March* 31*st*, 1900.

The parties met at the Fifth Avenue hotel, in the city and State of New York, on the 31st day of March, 1900, at 10.30 a. m., pursuant to agreement between the solicitors in the above-entitled cause, to take the deposition on behalf of the complainant in the cross-bill of Charles N. Vilas.

Appearances: Mr. Joseph Fettretch and Mr. Miller, solicitors for the complainant in cross-bill; Mr. J. J. Darlington, solicitors for defendants in cross-bill.

The solicitors for the respective parties first consent that the testimony shall be taken down stenographically and reduced to typewriting.

CHARLES N. VILAS, a witness of lawful age produced on behalf of the complainant to the cross-bill, being by me first duly sworn according to law, being examined orally by counsel, makes oath, deposes, and says as follows—that is to say:

224 Direct examination.

By Mr. FETTRETCH:

Q. Where do you reside? A. At the Fifth Avenue hotel, New York.

Q. Are you one of the proprietors of that hotel? A. Yes, sir.

Q. Were you connected with that hotel in the year 1887? A. I was.

Q. And familiar with its guests? A. More or less.

Q. Did you know Mr. and Mrs. William J. Florence? A. I did.

Q. And were they at various times guests at the hotel? A. The hotel was their permanent home.

Q. During the year 1887, they were guests at the house? A. So far as I know, they were.

Q. Did you make any investigation of the books of the hotel for the purpose of ascertaining whether they were guests of the *n*otel or not during the year 1887, at the request of Mrs. Florence? A. Yes, sir; I caused such investigation to be made.

Q. Will you look at the paper which I now show you, and state whether that is the result of that investigation for those details? A. Yes; I caused this paper to be made, and I signed the firm name to the paper.

Q. And so far — you know, that is a correct statement of their being guests at the hotel during that year? A. Yes, sir.

225 Mr. FETTRETCH: I offer this in evidence.

The paper offered is marked "Complainant to Cross-bill's Exhibit No. 1, March 31st, 1900, T. F. D., com'r." It is as follows:

Fifth Avenue hotel, Madison square, New York.

APRIL 18TH, 1899.

DEAR MRS. FLORENCE: We find, upon reference to our books for the year 1887, the following dates of arrivals and departures of yourself and Mr. Florence:

Mr. and Mrs. Florence & maid came Feb'y 27, left Feb'y 28th.
" " " " " M'ch 13, " M'ch 21st.
" " " " " " 27th," Apr. 3rd.
" " " " " Apr. 10th.

Mr. Florence (only) left Apr. 23rd, returned June 4th.
" " " " June 11th, " July 13th.
All left July 20th.
Mr. & Mrs. Florence & maid came Aug. 1st, left Aug. 25th.
" " " " " Dec. 11th, " Dec. 12th.
Mrs. Florence and maid came Dec. 17th.
Mr. Florence came Dec. 18th.

Very respectfully,

HITCHCOCK, DARLING & CO.

Q. Do you know whether during the periods during which Mr. and Mrs. Florence were guests at the hotel, or residents therein,
226 that Mrs. Florence kept in the safe at any time any box or other receptacle containing valuables of any kind? A. Well, there were packages that went in and out of our safe at different times, both by Mrs. Florence and Mr. Florence, and by the maid.

Q. But what they contained you could not at this time say? A. I have no knowledge of that.

Cross-examination.

By Mr. DARLINGTON:

Q. Were you ever informed, Mr. Vilas, that that box contained thousands of dollars? A. I don't remember that I was; I took it for granted that it would have some value or they would not put it in our safe.

THOS. F. DANIELS, *Com'r, N. P.*,
For CHARLES N. VILAS.

It is stipulated by counsel on both sides that the commissioner may sign the deposition of the witness without requiring his attendance personally.

227 In the Supreme Court of the District of Columbia.

PETER F. CONLIN ET AL.
vs.
PETER CONLIN ET AL. } In Equity. No. 16225.

STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Thomas F. Daniels, notary public of the city, county, and State of New York, do hereby certify that the foregoing deposition of Charles N. Vilas was, on the 31st day of March, 1900, taken before me, by consent of the respective solicitors for the parties in the above-named cause, at the place in said deposition named, in said city, on behalf of the complainant in the cross-bill in said cause.

I further certify that it was agreed by said solicitors for the respective parties that the testimony should be taken down in short-

hand and reduced to typewriting, and should be thereupon signed by me as commissioner for the witness.

And I further certify that my fees for taking said testimony are ten dollars, which have been paid by the complainant in the cross-bill, and that I am not of counsel for either party to this cause or interested in the event of the suit, and that I am now about to close the depositions under my seal, and being unable to personally return the same to the supreme court of the District of Columbia, I shall now place the said deposition in a sealed envelope directed to the clerk of the supreme court of the District of Columbia, and
228 deposit the same, with postage prepaid, in the United States mail.

Witness my hand and seal this second day of April, A. D. 1900.

THOS. F. DANIELS,
Notary Public, N. Y.

[SEAL.]

229 *Decree, &c.*

Filed February 7, 1902.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } No. 16225. Equity.

This cause coming on to be heard upon the pleadings and the evidence, and having been argued by the solicitors for the parties respectively and duly considered, it is thereupon by the court, this seventh day of February, A. D. 1902, adjudged, ordered, and decreed as follows:

1. That the cross-bill of the defendant Annie Teresa Coveney be, and the same hereby is, dismissed with costs in favor of the defendants to said cross-bill and against the said Annie Teresa Coveney, as to all costs of her said cross-bill and the proceedings thereunder.

2. That all the right, title, interest, and estate of the parties to this cause in and to the real estate described in the bill, namely, lots twenty-three (23) and twenty-four (24), in John B. Alley and Harvey Page's recorded subdivision of lots in square numbered ninety-two (92), in the city of Washington, in the District of Columbia, be sold for the purposes of partition or division among the parties in interest, as prayed in the bill.

3. That William J. Miller, James F. Smith, and Joseph J. Darlington be, and they are hereby, appointed trustees to effect such sale, and their manner of procedure shall be as follows: Said
230 trustees shall first file their joint or their several bond, as they may elect, to the United States of America in the penal sum of twenty-five thousand dollars, with one or more sureties approved by the court or one of the justices thereof, conditioned for the faithful performance of their duties as such trustees, and said trustees shall thereupon proceed to sell the said real estate at public auction in

front of the premises to the highest bidder, after first giving at least ten days' notice by public advertisement in some daily newspaper published in the city of Washington, in the District of Columbia, Sundays excepted, of the time, place, and terms of sale, which terms shall be as follows: One third of the purchase-money in cash and the balance in one and two years, with interest at five per centum per annum from the day of sale, secured by deed of trust upon the premises, or all cash at the purchaser's option, and the said trustees shall thereupon make report under oath of the said sale and of the fairness thereof, and shall hold the proceeds of such sale subject to the further order of the court.

A. B. HAGNER,
Asso. Justice.

From the foregoing decree dismissing cross-bill and granting the relief prayed in the original bill the defendant Anna Teresa Coveney, as complainant in cross-bill and defendant in original bill, in open court prays an appeal to the Court of Appeals of the District of Columbia, which is allowed, bond in the sum of $200 — be given as supersedeas, to be approved by the court, or deposit in the registry of the court $200. February 7, 1902.

A. B. HAGNER,
Asso. Justice.

231 Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN, ANNA TERESA Coveney, *et al.*

&

ANNA TERESA COVENEY
vs.
BENJAMIN F. CONLIN ET AL. } Cross-bill.

} Equity. No. 16225.

Complainant Anna Teresa Coveney in cross-bill of complaint hereby appeals from the decree of the court of the 7th day of February, 1902, that dismisses her cross-bill of complaint, to the Court of Appeals of D. C., and the clerk will please issue citation; and she also appeals from said decree of the court as grants the prayers and the relief prayed by the complainant in the original bill of complaint to the said Court of Appeals of the District of Columbia, and the clerk of the court will please issue citation.

W. J. MILLER,
F. FETTRETCH,
Sol'rs for Complainants in Cross-bill and Defendant Anna Teresa Coveney in Original Bill.

Feb'y 8, 1902.

Appeal entered—
BY CLERK.
1902, 2, 8.

232 In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } No. 16225. In Equity. Dock. 38.

The President of the United States to Benjamin F. Conlin, Peter Conlin, Mary J. Conlin, Georgiana C. Conlin, Frances C. Conlin, Lucretia A. Tooker, Mary Jane Wiard, Harvey L. Maddox, Winnifred Cook, George S. Cook, Virginia Seggerman, Victor A. Seggerman, Charlotte L. C. Lisecki, John Lisecki, Frances Lindsy Maddox, Joseph H. Tooke-, and Charlotte L. Sullivan, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal from decree dismissing cross-bill of appellant in the supreme court of the District of Columbia on the 7th & 8th days of February, 1902, wherein Annie Teresa Coveney is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 8th day of February, in the year of our Lord one thousand nine hundred and two.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 8th day of February, 1902.

JAMES FRANCIS SMITH,
Attorney for Appellees.

233 In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN
vs.
PETER CONLIN ET AL. } No. 16225. In Equity. Dock. 38.

The President of the United States to Benjamin F. Conlin, Peter Conlin, Mary J. Conlin, Georgiana C. Conlin, Frances C. Conlin, Lucretia A. Tooker, Mary Jane Wiard, Harvey L. Maddox, Winnifred Cook, George S. Cook, Virginia Seggerman, Victor A. Seggerman, Charlotte L. C. Liscecki, John Lisecki, Frances Lindsey Maddox, Joseph H. Tooker, and Charlotte L. Sullivan, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal from decree granting prayers and relief [illegible] in original bill of complaint in the supreme court of the

District of Columbia on the 7th & 8th day- of February, 1902, wherein Annie Teresa Coveney is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 8th day of February, in the year of our Lord one thousand nine hundred and two.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 8th day of February, 1902.

JAMES FRANCIS SMITH,
Attorney for Appellees.

234 *Memorandum.*

February 27, 1902.—$200.00 deposited in lieu of appeal bond.

235 *Opinion of Court.*

Filed March 3, 1902.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN ET AL.
versus
ANNIE TERESA COVENEY ET AL. } No. 16225. Equity.

There can be no doubt that before the passage of the act of the 17th of January, 1887 (27 Stat., 371), after-acquired real estate within the District of Columbia would not pass to a devisee to the prejudice of the heirs-at-law, even though an express devise thereof, as after-acquired lands, had appeared in the will.

The act referred to provided that any will thereafter executed from which it *shall appear* that *it was the intention of the testator to devise property acquired after the execution* of the will shall be deemed, taken, and held to operate as a valid devise of all such property. But the act is expressly prospective in its terms, and could not govern a will previously executed, and no such intention clearly appears from the language used in the will before us.

Assuming in behalf of the widow that the provisions of the will devising all the testator's property "*wheresoever* and *whatsoever*" that he should die seized and possessed of would pass after-acquired real estate situated in the *State of New York*, the contention of her counsel that it would be equally effective within the District of Columbia cannot be sustained.

236 The devolution of real estate under wills is governed by the *lex rei sitæ*, while with respect to movable property the *lex domicilii* prevails. 1 Jarm., 1–2. Unless this were so, an

holographic will, without any witness, and leaving real estate to an ecclesiastical body as such, made on the day of the testator's death, in a State where such wills are effective, would be operative in every other State, though such dispositions were expressly forbidden by their laws.

As this contention cannot be admitted, the right of the widow to the land must be maintained, if at all, upon the other ground set forth in the cross-bill, that by force of the alleged agreement or contract between Florence and his wife, and of the execution of mutual wills in accordance therewith, the widow became entitled to receive the after-acquired real estate from her husband upon his death; that the omission of the testator in not providing adequately for the devolution of that property by a proper form of will should not be allowed to defeat the just right of the widow under the agreement or contract, and that the heirs-at-law should therefore be compelled in equity to supply the omission of the testator and perfect the title to the widow.

It is unnecessary to go into a lengthened examination of the great number of cases referred to in support of and in opposition of this contention. The general principles underlying the subject are admitted, and the inquiry may be confined to the consideration of the question whether the contract or agreement alleged is established as required by the rules of equity controlling the subject.

In two recent treatises on the law of wills, Underhill and Page, the authors present the principles very clearly. I read from section 13 of Underhill on Wills:

237 SEC. 13. "The revocation of joint and mutual wills.—Mutual wills, whether joint or several, are revocable by either testator during the lifetime of the other so far as his disposition of property is concerned, without notice to or consent of the others, unless the making of the will is the result of a contract by which each has agreed to devise his property to the others.

"If two testators who have united in the execution of a mutual will have devised their property to each other so that the devises form a mutual consideration, neither, after the death of the other and the probate of the will *as to his property*, is at liberty, after accepting the benefit conferred, to repudiate the contract to the injury of the heirs or next of kin of the testator who predeceased him. The mutual will was made upon condition that the whole shall be but one transaction. If the will is not revoked during the joint lives of the testators, he who dies first has a right to rely upon the promise of the survivor. He has fulfilled *his part* of the agreement, and it is not just to his representatives to permit a revocation when he has been prevented from revoking his will by a reliance upon the other's promise. It is too late for the survivor, after receiving the benefit, to change his mind because the first will is then irrevocable. It would have been differently framed, or perhaps not at all, if it had not been for his inducement. And where husband and wife make mutual wills in favor of one another, and subsequently are divorced, dividing the property between them, and the wife revokes her will

by destroying it, a revocation of the will of the husband will be implied from the alteration in the circumstances of the parties. So mutual wills made by two sisters, *each* devising all her property
238 to the other, are revoked as to the will of either on her marriage, though the sister marrying dies without issue in the belief that her will was unrevoked."

See also Page on Wills (1901), secs. 67 *et seq.*

SEC. 69. "As to revocability of mutual wills.

"The weight of authority is that joint and mutual wills are as revocable *as wills,* as other wills are (I Sw. & Tr., 144, *in re* Raine; Walpole *v.* Orford, 3 Ves. Jr., 409)."

"If the joint or mutual will is not made in *pursuance of any contract,* the right to revoke it is beyond question."

"If made as a contract, then, though the will may be revoked, the contract may be enforced in equity to have those taking the legal title hold as trustees."

SEC. 71. "Where such wills are enforceable as valid contracts, they do not stand upon any especially favored footing. *It* order to be enforceable, they must have all the essential elements of any valid contract."

"There must appear to be a *valid consideration,* and a promise by one to make a will in consideration that another shall make a specified disposition of his property has been held to be a sufficient and valid consideration."

"The conduct of a person who breaks such a contract is not a fraud; though dishonorable, it is only a breach of contract."

SEC. 73. "The contract must, in order to be enforceable, be clearly proved and be certain and unambiguous in all its terms. Sluniger *v.* Sluniger, 161 Ill., 270."

"In no other class of contests are parties so likely to fail to come to a definite agreement as in this class, and in no class of cases do the courts look upon the contract to be enforced with greater jealousy. *Id.,* 130 Ill., 445; 113 Ill., 186."

239 "A mere expression of intention to make a certain disposition of property is of course not valid as a contract; still less are vague offers. Wilburn *v.* Borer, 4 Kan. App., 109." See other cases cited in this section.

On behalf of the widow it is also contended that the real estate in controversy was paid for in part or altogether by her individual money, advanced by her for that purpose, and that the title should therefore be placed in her under the doctrine of a resulting trust.

As the effort in either view is to divert the title from the heirs-at-law in opposition to the provisions of the statute of frauds, it is quite well established that in the absence of writings signed by Florence to the effect claimed the parol proof must be of the most satisfactory character. As declared in Lord Walpole *v.* Lord Orford, 3 Ves., 402, by the chancellor, all agreements to be executed in equity must be certain and defined, equal and fair, and proved as the law requires, and his doubts upon those points compelled him to refuse relief.

This is especially the case where the contract and proofs are altogether in parol, and reliance is had upon acts of part performance to obtain a specific execution of the verbal contract or agreement. In such cases the requirements of equity are, 1st, that the alleged contract itself must be set forth in the pleadings with certainty; 2d, it must appear to be fair and just and mutual in its character; 3d, the proof must establish the particular contract alleged, as it will not be sufficient merely to prove that there was some contract or understanding of the general character with that alleged; 4th, the acts of part performance relied on must appear to be referable to the contract alleged and not to some other contract, although similar
240 in its nature; 5th, they must be acts which have been performed by the party seeking the specific execution of the contract and not by the other party; 6th, they must appear to have been injurious to the party performing them, and, 7th, they must be of such a character as cannot be compensated by damages, and unless all these essentials appear the court will not decree specific performance.

As expressed in 67 Md., 373, Wilkins *v.* Shipley, "The proof of such a contract should be of a definite and conclusive nature."

Or, as was said in 20 Maryland, 62, Whitridge, *v.* Parkhurst, "The admission of parol evidence to establish such an agreement is in violation of the statute of frauds, unless of the clearest and most satisfactory kind; and unless the acts of part performance relied upon to take the case out of the statute be clear and definite, and refer exclusively to the alleged agreement."

1 Dessans, 116, Izard *v.* Middleton.

And in Mundorff *v.* Kilbourn, 4 Md., 459, "These, we think, are to be dealt with no less strictly in equity than other contracts within the statute of frauds. Indeed, there are no considerations which should subject them to a more rigid application of the statute."

The widow, neither in her answer nor in the cross-bill, makes any assertion or suggestion that she had paid any part of the purchase-money of the Connecticut Avenue property. The defendants, however, in their answer, had insisted that the agreement alleged, if it ever existed, would be of no force as to the real estate unless it were in writing, and *also "unless the said real estate were purchased wholly or in part with money belonging to the wife, neither of which*
241 *matters is so alleged in the cross-bill."* And these last words seems to have first suggested to her the expediency of making such a claim; and although several amendments to her pleadings were allowed, it was not until she was being examined in New York in April, 1899, that the idea was presented. Then she testified, in reply to questions of her counsel, that she had lent Mr. Florence $7,000 or more in cash to help to pay for the Washington property (p. 6). She adhered to her statement of this sum throughout the cross-examination (p. 76), and had described the circumstances of the payment and the names of the several persons who

were present and the source from which she derived it (pp. 76 *et seq.*) without varying her statement as to the sum paid.

But in the November following, in Washington, Mr. Stellwagen, when testifying, apparently in her presence, as to the sum *due* by Florence as the *cash payment* on the purchase-money of the Washington property, stated the amount to be $5,712.50. When it came to be her turn for re-examination (p. 11 *et seq.*) she said she had been mistaken in testifying that the amount she had advanced was $7,000; that it was not as much as $7,000, but that the sum she gave him to be paid to the trustees was exactly $5,712.50, the identical sum mentioned by Mr. Stellwagen. But she was again wrong. She supposed that sum represented all the money Florence paid at that time, whereas the entire amount paid to Stellwagen at that time by Florence was $5,752.30, $5,712.50 being the cash payment at the purchase, $37.75 being money due to John Ennis, Esq., and $2.05 due for recording deeds, etc., and this entire amount, $5,752.30, was proved to have been paid by a check of Mr. Florence of April 22nd, 1887, on the Second National Bank of New York. So, if
242 she had really advanced to Florence the sum really chargeable against him, she would have given $5,752.30 instead of $5,712.50.

Her statement of the amount she then paid was no more correct than any other particular of her story. She had given with great circumstantiality the particulars of a telegram from Ennis urging Florence to make a further payment for fear he would lose all he had previously paid, whereas the fact was, the money then paid by Florence was the first payment he ever made on the purchase, and of course there never could have been any danger of his losing any *prior* payment. It was also proved that he, Florence, had considerably more money in each of two banks in New York at that time than was needed to make the payment; that there never had been any pressure upon him for the money, and that he paid it all off two or three years before the balance was due; so that if he had really told his wife he had no money to make the payment, his statement would have been wilfully false.

She also stated that she had afterwards paid other sums of money, $5,000, $2,000, and so on, on the purchase, and mentioned the period between which she thinks she paid them; but beyond her unsupported statement there is no proof whatever of such payments. She said the first advance was made on an occasion when several persons were present in Florence's parlor in the Fifth Avenue hotel, in New York; that Mr. Florence was very much concerned about a telegram he had received from Mr. Ennis, who was his counsel in Washington, in these words, or to the same effect, as stated by Mrs. Coveney and the maid Nerini: "Dear Billy: You must send on the mortgage money or you will lose your property," or "lose
243 what you have already paid." Mrs. Coveney adhered almost literally to what she said, especially to the statement that there was danger of losing what he had already paid if he did not at once send on the sum required. The trustees and all the other

witness- prove there was never any pressure upon Florence to pay—that he did not avail himself of the time allowed him; and an entry in Mr. Ennis' book shows that he sent on the final deed to Florence at least two or three years before the last payment was due. If Florence really received that telegram, he must have thought Ennis had gone crazy. Mrs. Coveney proceeds to say she sent Nerini forthwith down to the office in the Fifth Avenue hotel where she says her money was kept to obtain the amount to lend Florence. The proprietor of the hotel said if he had had any idea that there was any such sum of money there he would have been very particular about taking charge of it, though of course nobody would think of putting a box with such a sum of money in the hotel office. Nerini said Mrs. Florence opened the box, took out $7,500, and gave it to Florence, and he sent it off, saying, "This goes to Ennis." Then, Mrs. Coveney says, she put the rest of it back, and when she next went to Europe she spent it on dresses. In explaining how she obtained the money, she said Mr. John W. Mackey had given them a gold brick in California, worth $25,000, which they sold, and that it was part of this money she lent to Florence. Mackey, instead of being in Paris or San Francisco, chanced to turn up in New York, and when examined about the gift he declared he never gave either of them a gold brick worth $25,000, or any money or any brick at all.

She further said she knew Larry Jerome was present at the time, and also Mr. John McCullough and a gentleman named
244 Hecksher, who was sitting near the window, smoking a cigar.

Hecksher happened to be the only person of those named who was still alive, and when examined he testified that, though he had been in Florence's rooms occasionally, Florence had never "talked shop," which meant he had never talked about business with him on any of these occasions; and he denied that any such thing ever occurred in his presence. When asked if it might not have occurred while he was sitting in the window, smoking, he answered that it happened he was not a smoker at all at that time, and had only begun to smoke about two years before his testimony was given. With respect to her statement that John McCullough was present, it was proved that John McCullough was dead at the time referred to, and that for two years prior to his death he had been confined in an insane asylum.

With every desire to avoid dealing harshly *to* the complainant, unfortunately, I cannot say, it is impossible to believe any par*y* of this remarkable story. Can it be doubted that Mackey never gave her a gold brick; or that Florence was under no necessity to borrow money to pay on the Washington lots; or that she did not pay either of the different sums of money she claims to have paid on the purchase; or that no such telegram was sent by Ennis or received by Florence; or that neither Jerome nor Hecksher nor McCullough was at the alleged meeting, and that no such incident occurred? And inasmuch as Mrs. Florence must have known that each feature of the story was absolutely false, so that she could not possibly have

been mistaken about its falsity, can the court hesitate to reject her entire testimony as coming from a source utterly unworthy of belief, upon the authority of the Santissima Trinidad, 7 Wheat. (See also Oliver *v.* Cameron, Mackey & MacArthur, 245.)

245 A good deal is said to support the idea that Mr. Ennis, if living, would support the present claim of Mrs. Coveney. But Mr. Ennis lived until November, 1896. This bill was filed in February, 1895, Mr. Ennis being one of the counsel and signing it as such. The answer of Mrs. Coveney was filed 3rd February, 1896, and on the same day the cross-bill was filed. Mr. Ennis was still living and was one of their counsel in June, 1896, when the defendants filed their answers denying every particular of Mrs. Coveney's cross-bill from beginning to end. What would be his position in the present aspect of the case if he were now living? Can it be assumed that he would have been instrumental in voluntarily joining with the heirs-at-law in bringing this suit to *which* the widow out of her property, if he had really done what Mrs. Coveney swears he did and said about the purchase?

In Nerini's testimony she is asked if she had not been sent for by Mrs. Coveney and offered $500 to testify in her favor, and if she did not say to Mrs. Coveney that she did not want that, but she would take a trip to Europe, if Mrs. Coveney would pay her expenses, and she answered in the negative. She was then asked if she had not told Elliot she had this conversation with Mrs. Coveney, and she also denied this. Elliott swears positively that she did not tell him so; and when Nerini is asked about this on cross-examination she repeats she did not tell this to Elliott, but admits she did say so to her husband. These circumstances are not commendatory of the reliability of Nerini's testimony. But there are other objections to it.

Mrs. Coveney, on her first examination, testified that Nerini was in her service for 11 years and left her in 1883. After it had

246 been pointed out that the loaning of the money must have taken place in 1886, three years after Nerini had left, Mrs. Coveney's counsel on her subsequent examination said to her, "You stated that Nerini was present when this money was loaned by you to Florence, and that you sent her down to get the money for this loan. But you stated first, that she was not in your employment after 1883—after she was married—and this thing occurred in 1886. How do you account for this?" She did not account for it in a very satisfactory manner, for her reply was that "*Nerini was mistaken in the dates.*" But the mistake was not in the dates, nor by Nerini, but in the pretense that Nerini had brought up the box from the hotel safe three years after she had left her service at the hotel. The further attempt of both Nerini and Mrs. Coveney to reconcile these contradictions by the suggestion that Nerini had become a dressmaker after she left complainant's employment, 1883, and after that time had called at the hotel frequently, was a very lame explanation of the difficulty.

After Nerini admitted she told her husband she did not want the $500, and that she did want a trip to Europe instead, her denial

that she had said this to Elliott becomes rather improbable. Elliott was not at all interested in the cause, whereas Mrs. Coveney was, and so was Nerini to the extent of $500 in prospective, according to the testimony. In fact, Mr. Conlin, who testified only as to the pedigree, is the only witness examined on behalf of the heirs-at-law who has any interest in the result at all.

The entire testimony adduced by Mrs. Coveney as to her alleged payment on the purchase-money fails to establish her contention, and the court must therefore reject the entire story, as is manifestly its duty.

247 The remaining inquiry relates to the existence of the alleged contract or agreement between Florence and his wife, which, it is insisted, was the motive or cause of the execution of the two wills. A careful examination of the numerous decisions adduced by the respective counsel has satisfied me of the necessity of establishing such an agreement in addition to the proof of the mutual wills; but I shall not consume time in considering the particulars of these cases. The draughtsman of the cross-bill showed his appreciation of this necessary part of his case by setting forth the existence of an antecedent agreement, the motives of the husband and wife in entering into it, and the particulars of the contract in accordance with which they had executed mutual wills, designed to vest in each other reciprocally all the property of which each should die seized. Both upon principle and authority such an agreement and its establishment by adequate proof are indispensable to the success of Mrs. Coveney in this controversy.

It would be an astonishing thing if the mere execution of mutual wills, the result perhaps of a passing fancy, should so tie the hands of the two testators that each, without notice to the other, would be powerless to change his will, as every person under ordinary circumstances has full right to do. The testators may have drifted half the world's circumference asunder, so that no notification could be possible; one might have married and become the parent of a child; one might have become enormously rich and the other insolvent; or other circumstances might have developed which ordinarily would invalidate a will; and yet the rash testators are

248 to be held bound by such mutual wills entered into without any contract, even such as would be required to be shown about a trivial bargain about insignificant merchandise.

Although mutual wills in themselves might contain a sufficiently formal contract or agreement expressed in terms, yet the mere existence of mutual wills containing no statement or proof of such agreement would have no such effect. In the recent and important cause of Edson *vs.* Parsons, 155 N. Y. Reports, it was held that an agreement to execute mutual wills is not established by the fact that parties make similar wills with cross-provisions in favor of the survivor, and that to establish an agreement for mutual wills, and defeat the right to revoke a will, there must be full and satisfactory proof of the agreement, which cannot be supplied by presumption.

That cause was argued by most distinguished counsel, and the

judgment in the Supreme Court (85 Hun., 263) was affirmed by all the judges who heard the argument.

The facts there attending the execution of the mutual wills were much more conducive to the establishment of an antecedent agreement than those in the present case. The two testators were elderly unmarried sisters, greatly devoted to each other. The diaries kept by each were produced in evidence, and they evinced that for some time they had been contemplating the execution of such wills and were in consultation with the same counsel who prepared both wills, which were executed the same day, in the presence of the same witnesses, and deposited in the same box in a safe deposit company. Their provisions were identical. I will read an interesting extract to show how strong the circumstances were (pp. 562–'3, 155 N. Y.)

These two sisters were devoted to each other and to their brother.
249 "After Tracy's death, Mary and Susan continued to reside together in the same house, united by ties of the strongest affection and leading lives of singular uniformity of thought and action. It might be said that their lives ran in one groove and, judging from extracts from their diaries put in evidence, were so blended, that they seemed to experience the same emotions, to view occurrences with the same eyes and to be moved to the performance of common acts. Thus it was, that they spoke of and planned their testamentary dispositions together; together visited their lawyer and, ultimately, executed, on the same day, before him and the same witnesses, wills having similar schemes for the distribution of their estates after death should separate them. There can be no doubt, but that their wills evidence a conclusion, which was reached by them after discussion and deliberation, as to the most advisable plan for the disposition of their property and we may fairly infer from the evidence that it was prompted by a desire, after making many charitable and benevolent gifts, to keep the surplus in the family, by giving it to their brother Marmont. They were, plainly, not ordinary wills, for each testatrix undertook to make a testamentary disposition contingent upon the survivorship of the other and it is in that feature, that, in truth, the contention of the appellant finds its support. That is, that there was a mutual representation that, in consideration of these identical and cross provisions in the two wills, the survivor would adhere to and carry out the provisions of her will; a representation upon which, when one of them should die, it should be presumed that she had placed reliance, and because of which, therefore, a court of equity would see to it that the testamentary provision made should not fail, through a diversion of
250 the residuary estate into other hands by a subsequent will.

"But, as it seems to me, an insurmountable difficulty, assuming that the contention might dispose our minds favorably to its reception, limits the province of our views. A pivotal question of fact was presented in the trial court and was there disposed of adversely to the plaintiff. The position taken by the plaintiff was that Mary and Susan Edson had entered into a mutual agreement to execute mutual wills. The distinct and controlling issue in the case was

there and the trial court found, upon the evidence, that the plaintiff had failed to prove that the wills were made pursuant to any agreement, or that they were mutual wills, and, therefore, dismissed the complaint upon the merits; holding that the property of Mary was not charged with any trust, or duty, and, at her death, passed under her subsequent will, absolutely, or as qualified by any trust provisions therein."

In Underhill on Wills, to which I have already referred, this point is thus discussed much better.

SEC. 288. "Effect of the statute of frauds on promises to devise land.

'A parol promise to devise land is void under the statute of frauds. So an agreement by virtue of which the provisor binds himself to leave all his property, real and personal, to the other contracting party, being void as to the real estate under the statute of frauds, will not be enforced in equity as regards the personal property where the contract is one and indivisible. Failing in part, it may be set aside altogether. But a part performance of the contract to devise by the plaintiff will prevent the application of
251 the statute of frauds, and he may then recover from the estate of the promisor under a *quantum meruit*."

Referring again to Page on Wills, we find at sec. 74 that contracts to devise real property are within the statute of frauds, and the contract cannot be proved by parol, as where the contract is to leave all one's property, both real and personal, to another. 48 Ohio State, 25.

On the subject of part performance, Page—

Sec. 76 discusses what is a breach of such contracts, where the party omitted to make the will through negligence, or in good faith thought he had done so. See 21 Mont., 251; 53 Pac., 742; 46 S. W., 477, Tenn., Green *v.* Organi.

SEC. 79. In suits for breach of contract in England, the contract must be clear and certain, fair and reasonable, in order to bind.

SEC. 81. Evidence.—Legally neither party can testify in such actions, the promisor being dead and the promisee being prohibited from testifying as to transactions with the promisor in his lifetime. Newton *v.* Field, 98 Ky., 186.

SEC. 82. Evidence that the will was made and that the act alleged as a consideration was done, does not establish the existence of a contract. Edson *v.* Parsons, 155 N. Y., 555; see, also, 118 Mo., 660, Peters *v.* Flanders.

Again referring to Underhill on Wills—

SEC. 289. "As to revocability of wills made in carrying out a contract to devise.—The general rule under which the revocable character of wills is universally admitted to exist, is subject to a seeming exception, viz: where the execution of the will is a part of a contract to make a will, and the person in whose favor the devise was made has gone into possession and made expenditures upon faith in the contract."

252 But the acts of part performance must be done by the person seeking the execution of the contract. When one is put

in possession of a farm without the execution of papers, and then wishes to compel the other party to the parol contract to perform it, he cannot rely upon such surrender of possession to him as part performance on his part. If, however, the other party wishes to enforce the contract against the fraudulent refusal of the vendee to comply with his part of the contract, he may rely upon his delivery of possession as an act of part performance by him.

"Perhaps it is hardly correct to claim that the will is irrevocable. While the testator may destroy the will or execute another revoking it, the contract itself cannot be rescinded, and will be enforced by the court in favor of the person who has acted upon it. If, however, no specific sum is mentioned to be devised, and the person making the promise merely agrees that he will leave the other party what he may have in his possession at his death, he retains by implication all his rights over his property during life, and may dispose of it by voluntary gift, provided there is no intent to defraud the promisee."

I refer now to sec. 292 of Underhill, because it states the law more favorably to the complainant than the case of Edson *v.* Edson.

SEC. 292. "The character and sufficiency of the proof required to establish the contract to devise.

"The burden of proof to establish the making of the contract is upon the plaintiff.

253 "He must establish it by clear and reasonably convincing evidence. The details of the agreement must appear, and the consideration and the time and place must be shown with reasonable definiteness. An oral declaration by the testator that he intended the plaintiff to have all his property, and the fact that the latter, who was his child, lived with him and rendered such services as are usually rendered by children when members of their father's family, are not enough. Thus, where it is claimed that a promise to devise was made in consideration of services to be rendered, or support to be given, the evidence must be definite and satisfactory as to the character of the services or support. But in many cases the courts have dispensed with evidence of the usual formal execution of a contract, particularly where the parties dwelt together in one family or household. The courts will look to the intention rather than to the form. So, where the deceased had taken the plaintiff, who was his illegitimate child, into his family at an early age, recognized her as his child, gave her an education and board and clothing, and she remained in his household forty years, performing the duties of a daughter to him and his wife until his death, and she had refused advantageous offers of marriage upon the solicitations of the deceased and his suggestions that she would receive his estate upon his death, and she relied upon those suggestions, the court held that a sufficient contract to devise was made out."

Though the facts of the case before me are singularly like those in Parsons *v.* Edson, yet they are much less conducive to the
254 establishment of anything like the agreement which I believe to be essential to a recovery than those existing in Parsons

v. Edson. The Florence wills contain in themselves no suggestion whatever of the existence of such an agreement.

Reliance is placed upon the terms of the paper marked "A. T. C. Exhibit C," as supporting the theory of an antecedent contract to make mutual wills.

This paper appears to be a list furnished Florence by the clerks in the safe deposit company, in which he kept a box, giving a list of its contents. It is dated Saturday, May 23rd, 1891, and is headed "List of securities and assets in account of W. J. Florence," and all of it except two lines is in a clerkly handwriting. The first entries describe a lot in Brooklyn and a house and lot in Park avenue, N. Y., which are said to be owned by Mrs. Coveney. Then follows a list of four blocks of shares and bonds amounting to $25,060, which fills out the first page, at the bottom of which is written, in Florence's handwriting, "Correct list, 1891. W. J. Florence." On the next page the list is continued and contains a statement of some gold shares "of unknown value," $2,500 worth of shares of an insurance company, and a statement of $9,771.60 loaned on bonds and mortgages by Fisher & Co. in Washington.

Opposite each description of bond or share is the statement of the date when the interest or dividend is payable.

Immediately above the statement of the Fisher loan is this entry, "Lot on corner of Connecticut avenue bounded by 21st street in the city of Washington valued at $30,000 cost me $16,000;" and at the bottom of the last page, in Florence's handwriting, is written, "This is a correct list of securities, I give to my wife. N. Y., 1891.
W. J. Florence."

255 As a conveyance or as a testamentary instrument, the writing is, of course, valueless, and as a declaration of a gift from him of the property therein described it is equally without effect, for what he thereby said he gave to his wife was, evidently, the "*list*" and not the *securities* according to the grammatical sense of the words. He gave her the list, very properly, that she might be made acquainted with the dates and amounts of the dividend and interest coming from the securities.

He could not have meant to say he then gave *the property* therein mentioned to his wife, for the first two pieces of property are distinctly described as already belonging to his wife, and therefore not in his power to give again. As a declaration of something he then gave to his wife, it could not be applicable to the Washington lots, which were never placed in her name with his own, as she said it was agreed should be done with respect to the "partnership" property, for he continued to hold them in his own name until his death. This paper has no probative force or bearing upon the question of the alleged agreement or contract.

The list was a complete one of the entire contents of the box in which he kept the copies of the deeds of the three parcels of land, among them being the deed of the Washington lots which Ennis had sent to him in 1889.

We must look, then, for extrinsic evidence in this case to establish this contention.

There are but three witnesses adduced on behalf of Mrs. Coveney on this point. The first is her daughter, Mrs. Sisson, who says nothing, directly or indirectly, as to any such agreement. The utmost extent of her testimony consists in the statement that Florence
256 told her on one occasion at the Fifth Avenue hotel, "We have both been downtown and made our wills. I have left everything I own to your mama," whereupon Mrs. Coveney said, "Yes; and when I die, I have left everything to your pa," and that on another occasion shortly before he left for Philadelphia, where he died soon afterwards, he said, "I feel badly, but if anything happens to me your mother will have everything and be well provided for."

The second witness, Christine Nerini, who had been a maid of the Florences for 11 years before 1883, in which year she was married and left their services, testified that Florence always said to his wife, "Don't worry, it will always be well with you," and that whenever they had any trouble he said, "Well, it will be well for you. I don't think I shall live to be very old, and you have helped to save this money for me." And also that a great many years ago they said whichever should die first should leave it to the other, and he said, "Don't worry, for it shall be all right."

Laying aside the objections to the testimony of Nerini, which I have already considered, it seems to me impossible to hold that the testimony of these two witnesses together can be held sufficient to establish the existence of the agreement alleged in the cross-bill according to the principle laid down in this class of cases, which insists upon the necessity of full and satisfactory proof of the agreement, and which cannot be supplied by presumption.

There remains to be considered only the testimony of Mrs. Coveney. Assuming that it is admissible within a very liberal construc-
257 tion of the decision in the Stickney case, 131 U. S., 237, it still cannot be considered as more than the declarations of a widow, testifying after the death of her husband to statements alleged to have been made by him to her, out of the presence of others, the wife, too, being highly interested in the result of the suit, which, if her testimony is accepted, will give to her alone, and thus deprive the heirs-at-law, to whom he seems to have been attached, of all share in his estate.

Her testimony as to the agreement is confined to a few sentences in her New York depositions.

At p. 49 she is asked by her counsel whether there was any agreement or arrangement between herself and her husband after their marriage in regard to their earnings as actor and actress, to which she replies, "We shared alike; we were joint partners in business." "He never bought any property or real estate without consulting me." "In case he should invest money, it should be jointly invested." "In our conversations it was said that whatever was invested should be invested jointly."

All this has nothing to do with an agreement as to making mutual wills. And, in fact, it appears from her testimony further on that

only two pieces of property were ever invested in their joint names, and that the Washington property, which we have seen she claims to have advanced the money to pay for, in part or wholly, always stood in Florence's name alone.

When further asked whether, before going down to the lawyer's office, she and Mr. Florence had any conversations in regard to the making of their wills, she replied "that in case of his death he was to leave me everything; in case of my death I was to leave him everything." "We had a conversation about Barney Williams'
258 death, and I said it would be well to make our wills, and he said we should do it, and I said, 'And you will leave me everything, and I will leave you everything.'" She does not state that any reply was made by him to this suggestion on her part, and the entire statement seems to stop far short of the mutual agreement required to be proved in such case, and even short of that stated in her cross-bill. I find nothing else in her testimony strengthening these statements.

In view of the great discrepancies everywhere through her evidence with many of the undoubted facts in the case about important matters, concerning which she could not well be mistaken, I find myself unable to credit her statement on this subject (The Santissima Trinidad, 7 Wheat.; Oliver *v.* Cameron, MacArthur & Mackey, p. 248) and upon her testimony alone to decide against the heirs-at-law in respect of property which has fallen to them by a happy accident, probably not at all at variance with the wishes of the deceased.

I shall prepare a decree dismissing the cross-bill and directing a sale and partition.

A. B. HAGNER,
Asso. Justice.

259 *Directions to Clerk for Preparation of Record.*

Filed March 14, 1902.

In the Supreme Court of the District of Columbia.

BENJAMIN F. CONLIN, Complainant, *vs.* PETER COVENEY, ANNA TERESA COVENEY, *et al.*, Defendants, and ANNA TERESA COVENEY, Complainant, *vs.* BENJAMIN F. CONLIN, PETER CONLIN, *et al.*, Defendants.	In Equity. No. 16225.

To the clerk of the supreme court of the District of Columbia:

You will please, in making up the record on the appeal taken to the Court of Appeals of the District of Columbia in the above-entitled

causes on the original bill and cross-bill, make transcript in the record of the following papers filed in said causes, to wit:

1. The original bill of complaint.

260 2. The answer and exhibits of the defendant Anna Teresa Coveney to said original bill.

3. The order allowing defendant Anna Teresa Coveney to file cross-bill.

4. The cross-bill of Anna Teresa Coveney and exhibits.

5. The bill of revivor of cross-bill.

5½. Bill of revivor of original bill.

6. The amended and cross bill making Joseph Tooker a party.

7. The amended cross-bill of Anna Teresa Coveney.

8. The joint and several answers to the original bill.

8½. Answer of defendant Harvey L. Maddox to original bill, amended, and bill of revivor.

9. The answers to said cross-bill.

10. Answer of defendant Frances L. Maddox.

11. Amendment of cross-bill by Anna Teresa Coveney.

12. Answer or infant defendants.

13. Answer of defendant to amended bill and bill of revivor.

14. Demurrer to cross-bill.

15. Order overruling demurrer and leave to answer cross-bill.

16. Answers to cross-bill.

261 17. Replications.

18. All depositions and exhibits.

19. Decree of court.

20. Opinion of the court (if any be filed).

W. J. MILLER,
J. FETTRETCH,
Solicitors for Anna Teresa Coveney, Defendant in Original and Complainant in Cross Bill.

We do not want to add any papers to above.
March 11, 1902.

J. J. DARLINGTON,
JAS. FRANCIS SMITH,
Attorneys for Appellees.

To Messrs. J. J. Darlington and J. Francis Smith, Esqrs., sol'rs for complainant and defendant in original bill and sol'rs for defendants in cross-bill in the above-entitled causes:

We herewith serve on you the above list of the papers which we think ought to be copied into the transcript of record in the above-entitled causes necessary for a full hearing in the Court of Appeals. Will you please go over the same, and if any other papers in the causes you may desire to have in said transcript, please let

262 *me* or the clerk know and we will consent to the same.

WM. JOHN MILLER,
JOS. FETTRETCH,
Solicitors for Anna Teresa Coveney, Defendant in the Original Bill and Complainant in Cross-bill.

1902, March 8th.—Service of above is hereby acknowledged, with a copy thereof.

JAMES FRANCIS SMITH,
JAMES FRANCIS SMITH,
Solicitors for Complainant and Defendants in Original and Cross Bill,
Per H. W. S.

263 UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 262, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 16225, equity, wherein Benjamin F. Conlin is complainant and Peter Conlin *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 1st day of April, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1198. Annie Teresa Coveney, appellant, *vs.* Benjamin F. Conlin *et al.* Court of Appeals, District of Columbia. Filed Apr. 2, 1902. Robert Willett, clerk.

In the Court of Appeals of the District of Columbia, April Term, 1902.

ANNIE TERESA COVENEY, Appellant,
vs.
BENJAMIN F. CONLIN, PETER CONLIN, ET AL., Appellees. } No. 1198.

Whereas it appears that in making up of the transcript of record by the clerk of the supreme court of the District of Columbia filed in the Court of Appeals of the District of Columbia in above-entitled cause there has been omitted from said record the transcript of original will of said William J. Florence, marked A. T. C. Cross-bill Exhibit 1, but the clerk of said court in making said transcript of record has referred to the same by a note on said transcript at page 154, being page 78 of the printed Record, to wit, "For Exhibit A. T. C. Cross-bill Exhibit 1, see Exhibit A. T. C. No. 1, page 27" of said transcript being page 8, for Exhibit A. T. C. No. 1 on page 14 for said will of said William J. Florences; and, further, it appears that there has been omitted from said transcript of record transcript of the original Exhibit A. T. C. Cross-bill Exhibit No. 3, called "List of securities and assets in account with William J. Florence," signed correct list, 1891, W. J. Florence, and also "This is a correct list of securities and given to my wife July, 1891, W. J. Florence," and in a note on said transcript at page 156, printed Record, page 79, refers to said exhibit as A. T. C. Cross-bill No. 3, see Exhibit A. T. C. No. 3, p. 37 of Transcript, printed Record, page 19. It is hereby stipulated and agreed this 23rd day of April, A. D. 1902, by counsel in above case, that said will of said William J. Florence, as on page 14, printed Record, being Exhibit A. T. C. No. 1, shall be read, used, and considered by the court and counsel in the case as, for, and in place of the said original will of said William J. Florence, offered and filed as evidence in said cause and marked Exhibit A. T. C. Cross-bill No. 1; and, further, that said Exhibit A. T. C. No. 3 shall be read, used, and considered by the court and counsel in the cause as, for, and in place of the original of A. T. C. Cross-bill No. 3, offered and filed as evidence in said cause; and, further, that either party to said cause can have leave to show and read to the court the original Exhibit A. T. C. Cross-bill No. 1 and said Exhibit A. T. C. Cross-bill No. 3.

WM. J. MILLER,
Solicitors for Appellant.
J. J. DARLINGTON,
JAMES FRANCIS SMITH,
Solicitors for Appellees.

[Endorsed:] No. 1198. Court of Appeals, D. C., April term, 1902. Annie Teresa Coveney, appellant, *vs.* Benjamin F. Conlin *et al.* Stipulation of counsel. Court of Appeals, District of Columbia. Filed Apr. 23, 1902. Robert Willett, clerk.

Court of Appeals, District of Columbia

APRIL TERM, 1902.

No. 1198.

ANNIE THERESA COVENEY, APPELLANT,

vs.

BENJAMIN F. CONLIN, PETER CONLIN, MARY J. CONLIN, GEORGIANA C. CONLIN, ET AL.

Appellees

APPEAL FROM THE SUPREME COURT, DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT OF APPELLANT.

John F. Fitch

WILLIAM J. MILLER,
Solicitors for Appellant.

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

In the Court of Appeals of the District of Columbia,

APRIL TERM, 1902.

ANNIE TERESA COVENY, Appellant, vs. BENJAMIN F. CONLIN, Peter Conlin, *et, al.*, Appellees.	No. 1198.

APPELLANT'S BRIEF AND ARGUMENT.

Statement of Case.

William J. Florence (whose name was Conlin but changed to Florence), died on the 19th November, 1891, in the City of New York, seized and possessed of real estate in the City of Washington, District of Columbia, known as Lots 23 and 24 in Square 92, which had been previously conveyed to him by deed dated the 22d day of April, A. D. 1887, in fee simple.

Mr. Florence left as his only heirs-at-law the appellees, and also left appellant Annie Teresa Coveny (formerly Florence) as his widow. He also died testate, having previously and on the 5th day of May, 1876 executed a last will and testament hereinafter (Rec., p. 14) shown.

On the 14th day of February, 1895, Benjamin F. Conlin, one of the appellees herein, as one of the heirs-at-law of said William J. Florence, filed his bill of complaint (Rec., p. 2) against the appellees herein as heirs-at-law, and this appellant, as the widow of said William J. Florence, for the partition of the said real estate, to wit, lots 23 and 24, and for the assignment of appellant's dower therein.

To this bill of complaint appellant filed her answer (Rec., p. 4), claiming title to the said real estate, fully setting forth the grounds upon which she based her claim, which are again stated in her cross-bill.

On the third day of February, 1896, by leave of the Court (Rec., p. 19), appellant filed her cross-bill (Rec., p. 20), against said appellees.

The cross-bill admits the filing of the original bill for partition, and admits that appellee Benjamin F. Conlin, the complainant in the original bill and the other appellees (except complainant in the cross-bill) are the heirs-at-law of William J. Florence, and that the appellant in the cross-bill is his widow. The cross-bill alleges the filing of appellant's answer to said original bill, and denies that appellees (other than appellant), as heirs-at-law, are entitled to the relief prayed for in said original bill, and sets up the fact that William J. Florence left a will, duly executed and admitted to probate and record in the State of New York, and a certified copy or transcript of said will was filed in this Court, holding a Special Term for Orphans' Court business.

The appellant, in her cross-bill, also alleges the marriage of appellant and William J. Florence, January, 1853, and that they lived together as man and wife until Mr. Florence died, to wit, November 19, 1891, and that Mr. Florence died seized and possessed of the real estate, to wit, said Lots 23 and 24; that prior to and after the marriage of herself with Mr. Florence they were actor and actress. That they mutually agreed with each other that each should assist the other in their professional engagements, and that the income derived from their engagements should be common property, and should, on the death of the one dying first, go to the survivor. That such income should be invested in real estate and good paying securities; that the business interests of both were in charge of her husband, the said William J. Florence, who took them to invest in real estate and good paying securities.

The appellant and William J. Florence were citizens of the United States, and residents of the State of New York, for twenty-five years prior to his death in November, 1891.

That during the whole of that period any property of which testator died seized would pass under a will containing words of general gift or devise, without regard to the date of the will, or the time when the testator became seized of the title to the real estate. That of said marriage between appellant and said William J. Florence no child was born.

That she and Mr. Florence having accumulated their property by their joint efforts and having in view the statute of New York as to the scope of a will devising all one's real

property, mutually agreed with each other that each should devise and bequeath to the other, their heirs, executors, administrators and assigns, all estate, both real and personal, which each then had, as well as such other property as each should thereafter acquire, or die seized and possessed of.

That pursuant to said agreement, the said William J. Florence and this appellant did make and execute last wills and testaments, each in favor of the other, in like form, manner and words, which wills were dated May 5, 1876. That each of said wills provides for the payment of the debts and funeral expenses of the one executing the same, and gives, devises and bequeaths the remainder of his or her estate, real and personal, and such as he or she should die seized and possessed, wheresoever and whatsoever, to the other, to have and to hold, to the one surviving, his or her heirs, executors, administrators and assigns.

See the Wills, Rec., pp. 14 and 78.

That the will of William J. Florence) was admitted to probate and record in New York, and subsequently a certified copy, with the transcript of record of the proceedings on said will in the New York Court was duly filed in this Court holding an Orphans' Court for the District of Columbia, and duly admitted to record.

(See transcript of record, pp., 8-17 & 78.)

That Mr. Florence, to show his understanding of said agreement and of his intention of carrying out his compact or agreement aforesaid with her (appellant,) and to show that he believed he had carried out said agreement, and in order that appellant might know what property would come to her upon his death, he, said Florence, in the summer of 1891, shortly before his death, gave to her (the appellant) a list of the securities and assets of his estate, which includes (among other things) the said real estate, to wit, lots on 21st street, Washington, D. C.

See Exhibit A. T. C. ~~Rec.~~ No. 3, p. 19.

And appellant, Mrs. Coveny (formerly Florence) in her cross-bill prays:—

1st. That a decree be passed in her favor decreeing that the title to said real estate, to wit, said lots 23 and 24, is vested in her, her heirs and assigns.

2d. That the appellees be declared to have and hold said real estate as trustees for her, her heirs and assigns.

3d. That appellees be ordered, within twenty days

from date of decree, to convey to her, her heirs and assigns, the said real estate.

4th. That she may have such further and other relief, etc.

5th. That the appellees answer, without oath, she waiving oath to their, or either of their, answers.

The appellees demurred to cross-bill. The same was overruled, with leave to answer.

The appellees, on the 9th of December, 1897, filed their answer to the cross-bill, in which they substantially say and admit the marriage of appellant and Mr. Florence, that they were actor and actress, and lived together as man and wife, but do not admit the agreement as to the profits or income from the professional engagements, that the same should be common property, and the property of the survivor, or that the same should be invested in real estate or other securities for their benefit, or the benefit of the survivor.

They do not admit any mutual agreement was made between appellant and Mr. Florence, her husband, and if any such agreement was made, they say no action could be maintained thereon, nor could the same have any validity as to the real estate in this cause, unless such an agreement were in writing, signed by Florence or by his authorized agent, or unless the real estate was purchased by Florence with money belonging wholly or in part to appellant in cross-bill.

They do not admit that there was a mutual agreement between appellant and Mr. Florence, her husband, to wit, that each should devise and bequeath to the other all estate, both real and personal, of which either might die seized and possessed, or that said will and testament of said Florence was made in pursuance of such agreement, or that appellant, Mrs. Coveny (formerly Florence), made her will and testament in favor of Florence pursuant to said agreement, and that no such agreement (even if made) would have any validity, or be sufficient to sustain any action in regard to the said real estate, unless in writing, signed by the parties, or their duly authorized agents.

There were amendments to the original and cross-bill and also bills of revivors filed.

To the original bill, answers—cross-bills and answers, bills of revivors, &c., replications were filed.

Testimony was taken by appellant and appellees.

The cause came regularly on for hearing upon the pleadings and evidence and exhibits.

The Court made a decree (Rec., p. 116) dismissing said appellant's cross-bill with costs in favor of appellees, and decreed

also that all the right, title, interest and estate of the parties to the cause in and to the said real estate described in the bill, namely, lots 23 and 24, be sold for the purpose of partition or division among the parties in interest as prayed in the bill, *i. e.*, in original bill, and appointed trustees to make the sale and so forth. From this decree appeal was taken to this Court

Assignment of Errors.

1st. The Court erred in holding appellant not a competent witness.

2d. The Court erred in rejecting the evidence of appellant.

3d. The Court erred in rejecting the evidence of Christine Narina.

4th. The Court erred in dismissing appellant's cross bill.

5th. The Court erred in dismissing appellant's cross bill with costs in favor of appellees.

6th. The Court erred in granting the relief prayed in the original bill in decreeing that all the right, title, interest and estate of the parties to the said cause in and to the real estate described in the said bill, namely, lots twenty-three (23) and twenty-four (24) in John B. Ally and Harvey Page's recorded subdivision of lots in said square numbered ninety-two (92), be sold for the purpose of partition or division among the parties in interest as prayed in said bill.

7th. The Court erred in refusing to grant the prayers of said appellant as prayed in the cross-bill.

Argument.

1st.

Appellant contends that her testimony was admissible evidence.

This suit is not in favor of or against executors, administrators or guardians.

The Act of Congress of July 2d, 1864, makes all parties to any action or proceeding and all persons interested therein to be competent

witnesses and compellable to give evidence on behalf of any of the parties to the action or other proceeding in any Court of justice in the District of Columbia.

Revised Stat. of D. C., Sec. 876, p. 103.

It is true the above act provides that the wife shall not be compellable to disclose any communication made to her by her husband.

Revised Stat. D. C., Sec. 877, p. 103.

In consideration of the above sections, in the case of Smith vs. Cook, 10 Appeals D. C., 487, this Court held that a married woman is a competent witness in a judgment creditor's suit against herself and husband to set aside as in fraud of his creditors a conveyance of land alleged to have been purchased by him, but conveyed by Court trustees to her through his procurement, and his testimony must be reviewed and considered notwithstanding it embraces transactions with her husband upon which her claim of separate estate is founded.

Again in Posey vs. Hanson, 10 Appeals D. C., 496, this Court also held—That under Revised Statutes of D. C., Sections 876–877, a widow in a suit involving her title to property is at liberty, although not compellable, to disclose communications made to her during marriage, by her husband.

Again in Capital Traction Co. vs. Lusby, 12 Appeals D. C., 295, the Court held: In an action by a husband and wife to recover damages for injuries to the wife, the wife is a competent witness, under Sec. 876, R. S., D. C.

Again in Stickney vs. Stickney, 131 U. S., 227, the Court held: that in a suit in equity in the Supreme Court of the District of Columbia it is competent, under the Acts of Congress, for a married woman, who is a party thereto to disclose (as a witness), directions given by her to her husband respecting the investment of her separate property though she could not be compelled to make such disclosures against her wishes (R. S. D. C., Secs. 876–877).

Hence we respectfully submit that appellant was a competent witness—as to matters and things or contract made between her and her husband, William J. Florence.

2d.

Appellant claims that before and after her marriage to Mr. Florence, they were actor and actress and that they agreed between themselves to continue to act as such actor and actress; and that the profit should be shared alike between them and whatever was invested should be invested by him for their joint benefit.

At this point and on this question we might here refer to her testimony:

Appellant shows that she and Mr. Florence were married (Rec., pp. 65-66) January, 1853, in New York City; that up to the time of the death of Mr. Florence they had been married 38 years; that she and Mr. Florence at the time of their marriage were actor and actress. He a great actor and she an actress; that after their marriage (Rec., p. 66) they continued acting together until two seasons before his death. That they had lived together for thirty-eight years. He died November 19, 1891. It was said between Mr. Florence and herself in regard to investments of money earned by him and her (Rec., p. 66) he should invest the money; it should be jointly invested and that whatever was invested they should share jointly. And she also on cross-examination (Rec., p. 70) testified that Florence (when she was in ill health) her husband took care of her and paid her a salary and she saved it and came to his rescue (Rec., p. 70) to buy the Washington property. Again on cross-examination (Rec., p. 70) she testified that Mr. Florence gave her half of the earnings although she did not act with him at that time. Afterwards she let him (Rec., p. 70) have some of the money back, to help him to pay for the Washington property. Again she testified that as the money was earned, it was divided between her and Mr. Florence or she would not have had the money to save. She would share the receipts at the end of the week—half and half. That the agreement between (Rec., p. 71) Mr. Florence and herself to be joint partners was made when they were married in 1853.

We contend that at the time of the marriage of appellant and Mr. Florence in New York City in 1853, the evidence shows, they entered into the above agreement to assist each

other in their professional engagements and that the profits or income should be common property, or, in other words, they were to share alike in the property or income from their profession, and the investments thereof.

It was intimated by the appellees, and it may be claimed here by them, that the earnings of the wife belonged to her husband—Mr. Florence. This proposition is not true under the laws of the State of New York, where, if a married woman labors for another, her services no longer belong to her husband, and whatever she earns in such service belongs to her as if she were a *feme sole.*

Code of New York of 1860, Chap. 60.
Brooks vs. Schwerin, 54 N. Y. R., 348.
Hills vs. Pine River Bank, 45 N. H., 300.

If the common law prevails, whereby the earnings of the wife belong to the husband—yet as Mr. Florence contracted with his wife (appellant) to allow her portion of the salary received by them for acting, and he paid it over to her, as testified by her—it will be treated in equity as her property.

3d.

Investment in Property, &c.

Appellant claims, and in fact shows, that it was agreed by and between Mr. Florence and her that Mr. Florence was to invest the money earned by them for their joint benefit, and he did invest in real and personal property. Appellant testifies that it was agreed between Mr. Florence and myself in regard to the investments of money earned by him and myself, he should invest the money, it should be jointly invested; it was said it should be jointly invested; that whatever was invested should be shared jointly. She was associated with her husband during the season he was with Jefferson and his affairs. She did not act with him, but she was associated with him. That he had to take care of her and pay a big salary, and she saved it and came to his rescue to buy the Washington property. He gave her half of his earnings, though she did not act with him; and she let him have some of their moneys back to help him to pay for the Washington (Rec., p. 70) property. As the money was earned it was divided between them or she would not have had money to save (Rec., p. 70). She would always share the receipts at the end of the week, half,

and half she banked every week, and Mr. Florence banked with her (Rec., p. 71). The agreement between her husband and herself to be joint partners was when they were married in 1853, and from that time they divided the money weekly (Rec., p. 71). I helped Mr. Florence pay for No. 62 Park avenue property. It was originally in his name, then it was conveyed to Mr. Cogan, and by Mr. Cogan on the same day deeded to me. The Central Park property stood in our joint name; it was sold (Rec., p. 71). The Bushwick property stood in our joint names; it was sold. On the 5th of May, 1876, when the will was made, I don't think Mr. Florence had any property in his name, not at that date. It was bought afterward.

At [illegible] she testified: I have produced here a list of securities footing up about $40,000. My husband left this at the time of his death. See this list (Record, page 19).

She further testified (Rec., p. 74): I remember after Mr. Florence had purchased the Washington property I gave him some money, but I cannot say how much. It was $7,000 and something.

At Rec., p. 75, on cross-examination, she testified: It was $7,000 and more. It was at the Fifth Avenue Hotel, New York City, I gave him money—not in checks, but in money (Rec., p. 75). I did not have it lying round in my rooms. I had it in a box. The house 62 Park avenue was paid for out of money I helped to earn. Christine saw me give this money to my husband (Rec., p. 75-6). She went down and got the box and brought it up; saw the money, and saw me take it out. After Mr. Florence took the money I had $10.000 left. I kept the $10,000. When I went to Europe I got a whole lot of clothes (Rec., p. 76). I remember when Christine Narini was married; it was about 1883 and from the Fifth Avenue Hotel; she left my employ. She has never been in my employ since except as dressmaker. She has never worked for me at the hotel (Rec., p. 76). Irrespective of the date when the money may have been paid for the Washington property, it is a fact that I advanced money on the property and towards its purchase, and that the amount was $7,500 or $7,600, I am not sure which.

Cross-examination.

That was the same $7,000 or $7,500 that I got out of the box Christine brought from the clerk's office (Rec., p. 77), leaving a balance of $10,000 in the box. Mr. Larry Jerome was present, and John McCullough and John Hecksher were both present. They were in the room and saw it. Then Mr. Florence wrote a dispatch in answer to a dispatch which he received from John Ennis, who was in Washington, in which

Ennis said: "You must pay or you will lose what you have paid on the Washington property." It was mortgaged. Mr. Florence had lost $85,000 in stocks and he asked me to give him the money, and I gave him the money. Then he sent the dispatch: "All right, John; Annie has come to my rescue. She has loaned me the money." This took place while Christine Narini was in my service, before she was married.

On Rec., 97, of testimony taken at Normandie Hotel, Washington, Mrs. Florence, referring to her evidence in regard to the advancement of money to Mr. Florence in the presence of Christine Narini, says she is mistaken in regard to the time; it was after her marriage, and (Rec., p. 97) she continued to be her dressmaker and worked for her for four or five years, and during that period was frequently at her place of residence at the Fifth Avenue Hotel, and Mrs. Narini was in the habit of coming there at the hotel daily. She corrects the amount and makes it $5,712.50 instead of $7,000. (Rec., p. 98) She says Mrs. Narini was never a maid to her after her marriage, but she was with her daily and weekly four or five years after her marriage working as dressmaker.

(Rec., p. 101) on recross-examination Mr. Darlington said: I want to see if I have this matter quite straight. If I understand this matter, Mr. Florence had bought this property and paid some money on it and was liable to lose this money unless the rest was paid. You gave him the money to pay it off? And she said, yes. Mr. Darlington further said: And since the time you loaned him the money there has been nothing due on the property? And she said, yes, sir; it was all settled up.

MRS. COVENEY recalled, testified: After showing how little knowledge she had of real estate transactions she said: Well, you see, Mr. Fettretch, to tell the truth, I don't know whether it was a mortgage or an installment, but I think it was a mortgage. (Rec., p. 104): I do not know anything about it except Mr. Florence bought a piece of property in Washington. I do not know anything about it except he said he wanted money to pay something on the mortgage, or something on the property at Washington. I think I paid the first money on this property in Washington. I think I gave Mr. Florence the money for this first installment or mortgage, or whatever you call it. (Rec., p. 105): I gave him $5,712.50. It was the very afternoon that Mr. Ennis telegraphed on (Rec., p. 195) in response to Mr. Darlington's question to tell him again about the telegram from

Ennis which had led to her giving this first advance of money she said the telegram read: Dear Billy: Send on the mortgage money or you will lose your property. Hurry up, old man. I have testified that my husband told me unless I helped him out he would lose what he had already paid (Rec., p. 105). I have testified that I have loaned him other sums.

Christine Narini was also examined at the Normandie Hotel in Washington on behalf of appellant and she testified: I was examined as a witness in this case once before. Up to the time of my marriage, which occurred in 1883, and for some years prior to that had been a maid to Mrs. Florence. I was frequently at the Fifth Avenue Hotel, where Mrs. Florence resided in 1887. I had to go there for fitting quite often. I remained longer than simply to fit. Sometimes I spent the afternoon. During the year 1887 when I worked for Mrs. Florence she lived at the Fifth Avenue Hotel. I remember being present when the telegram was said to have come from Mr. Ennis of Washington. I remember being there when Mr. Florence came in and was excited over something he had received. I do not know what they were about in the parlor, but madam asked me to go back down stairs and get her a box (Rec., p. 102). I had up to that time been sent for that box many times, and when Mrs. Florence asked me to go for the box I knew what she referred to; the box where she kept her money. I went and got it, and madam went and got out the money and gave it to Mr. Florence. There were a few persons there, but I could not remember their names. They were persons I had seen lots of times (Rec., p. 102). They were gentlemen. Prior to this time, that Mrs. Florence requested me to go down for the box I had heard Mr. Florence speak of Washington property many times. I had heard him speak of it even before I was married; speaking about it, he would like to get it, whether it was well or not, well to put money in such a place. I remember before I was married, and while I was in the employ of Mrs. Florence as maid, going with her and Mr. Florence to the City of Washington to look at property with Mr. Roessle (Rec., p. 103). I did not hear the telegram read that I speak of, but I heard Mr. Florence say he had to meet a very important payment. Mr. Florence got a telegram which said he must pay the balance or would lose what he had already paid. I heard that.

Charles N. Vilas, one of the proprietors of Fifth Avenue Hotel, March 31, 1900, testified: I have caused an examination of the books (of the Hotel) to be made to ascertain whether they were guests at the house during 1887, and find

that they were, and the dates are given (Rec., p. 114). I know during that time that there were packages that went in and out of the safe at different times, both by Mr. Florence and Mrs. Florence and by the maid. What they contained I had no knowledge (Rec., p. 115).

Being cross-examined he said: I don't remember that I was ever informed that the box contained thousands of dollars. I took it for granted that it would have some value or they would not have put it in our safe.

Mr. Stellwagen testifies that his firm of Thomas J. Fisher & Co., acting as agent for Mr. George E. Hamilton, trustee, sold those lots, 23 and 24, to Mr. Florence. That the terms of sale were $5,712.50 cash and $10,000 on time. The balance was secured by deed of trust, John F. Ennis and Thomas J. Fisher were the trustees. Mr. Ennis in this matter of those lots (Rec., p. 94) represented Mr. Florence.

Cashier DeWitt testifies that (Rec., p. 95) in March, April, May and June, 1887, he was clerk of Willard's Hotel; that he knew Mr. and Mrs. Florence as guests at Willard's Hotel. He recollects of Mr. and Mrs. Florence saying that they had been out, or were going out to look at some real estate. It was in the northwest section.

George E. Hamilton, Esq., testifies that he is a member of the bar of this Court, and that he was a trustee of this Court to make sale of this property, to wit, Lots 23 and 24. That the same was sold to William J. Florence for $15,712.50. The cash was $5,712.50 and $10,000 in deed of trust. That Mr. John F. Ennis was attorney for Florence (Rec., 109).

There can be no doubt

1st. That there was an agreement between Mr. Florence and appellant, his wife, to continue to act as actor and actress and that the profits of that business should be shared alike between them and whatever was invested should be invested by him for their joint benefit, and he did invest in real estate and personal property.

2d. That he gave her, just prior to his death, a list of the property in which he had invested. See A. T. C. No. 3, Rec., p. 19.

3d. That she had advanced money to him upon his request to be paid or applied as he stated toward the payment of this Washington property, there is and can be no contradiction. Mrs. Coveney (appellant, formerly Florence), has testified to that fact, and Christine Narina testified to the same fact.

Further it appears that a payment was made on the Washington property equal to the amount appellant testified she had given her husband. Further, Mr. DeWitt shows that in March, April, May and June, 1887, that Mr. and Mrs. Florence (appellant Coveney) were guests at Williards' Hotel in this city and Mr. and Mrs. Florence said they had been out or were going out to look at some real estate in this city—in the Northwest Section; this *carries out what appellant said that Mr. Florence* consulted her as to investments. We have further in corroboration of the fact that appellant gave money to Mr. Florence, her husband, the testimony of Mr. Vilas, proprietor of the Fifth Aveuue Hotel in the City of New York, that Mr. and Mrs. Florence had boxes or packages in the hotel safe, to which they and the maid had access and that he (Mr. Vilas) took it for granted that the boxes contained something of value or they would not have been put in the safe.

That Mrs. Florence may have been mistaken as to who was present at the time she says she gave the money to her husband is of no moment, for her testimony that she gave the money is not only not contradicted, but is corroborated by Christine Narini, and the probability that such a transaction occurred is sustained by the evidence of Mr. Vilas that there was a box or package in the safe which he presumed contained matters of value, and to which box or package the maid of Mrs. Florence had excess.

That Mr. Florence may have deceived his wife, and may not in fact have wanted the money for or on account of the Washington property is of no consequence. That is what she believed he wanted the money for, and there is no contradiction or attempt to contradict the fact that she did give the money to her husband as she says.

4th.

Appellant contends that prior to the marriage between her and Mr. Florence they were actor and actress, and that from and after their marriage it was agreed between them that they should act together and that the joint products of their efforts should be invested in real estate, and other good paying securities in the name of either of them, and that the survivor should take whatever property the other had at the time of his or her death.

That pursuant to this agreement and to carry it out Mrs. Florence and Mr. Florence in May, 1876, made mutual or reciprocal wills by which each gave to the other, and their

legal representative, all the estate, real and personal, wheresoever situated and of whatsoever consisting.

That shortly before the death of Mr. Florence he gave a statement to Mrs. Florence of the estate then held and owned by him, which included not only the property in his name, but also the property which stood in the name of Mrs. Florence.

That all the property in the statement referred to was the product of their joint efforts as actor and actress.

A brief reference to some of the evidence will perhaps be proper at this point on the question of the agreement and mutual wills.

Appellant, Mrs. Coveny, in addition to the evidence already referred to as of her marriage, the death of Mr. Florence in 1891, and of the investment of money earned by him and herself as actor and actress, and he should invest the money that it should be jointly invested, and in their conversations, it was said that whatever was invested they should share (Rec., p. 66) jointly—and further, that he (Mr. Florence) never bought any property or real estate without consulting her (Rec., p. 66).

Mrs. Coveny (appellant) further testified: "I remember Mr. Florence and myself (Rec., p 67) came to the lawyer's office in the matter of making wills, to Richard H. Bowne's office. Before coming we had a conversation in regard to the wills at the Fifth Avenue Hotel. That conversation was, that in case of his death he was to leave me everything—in case of my death I was (Rec., p. 67) to leave him everything. That was before the wills were executed. I recall a circumstance, there was something said about Mr. Barney Williams' death. I said it would be well to make our wills, and he said that we should do it, and I said, and you will leave me everything, and I you everything; and (Rec., p. 67) after that conversation went to Mr. Bowne's office, the wills were drawn up and executed.

Again she testified: "We made those wills so if I died he could get it (the property), and if he died (Rec., p. 72) I could get it all."

She produced a list of the securities and property (Rec., p. 72).

See also last page of Record.

She also testified that A. T. C. Exhibit I and Exhibit A. T. C. 2 are (Rec. p. 67) the papers prepared by Mr. Bowne as the wills of herself and her husband and they were executed by herself and her husband at that time, and were witnessed by Mr. Bowne and Mr. Zener at Bowne's office, and afterward went to the Park Bank, and she and her husband asked Mr.

Dakin and Mr. Schultz to witness the wills and she and Florence there also executed the wills that Mr. Dakin and Mr. Schultz became the witnesses to the wills and the wills were left there. That both the Exhibits 1 and 2 were executed at the same time at the Park Bank and also witnessed on the same day at the office of Mr. Bowne. That the two executions of those papers (Rec., p. 67) were on the same date. Again she testified (Rec., p. 68) on being shown said Exhibit 2, that the words on the face of that paper "Revoked Dec. 31, 1891—Annie Teresa Florence" are in her handwriting, and that they were put there after her husband's death, and that up to the time of her husband's death, and thereafter, the will remained in full force to December, 1891, and that the said Exhibits 1 and 2 were executed by her and her (Rec., p. 68) husband as mutual wills.

And she testified that the paper A. T. C., Cross bill, Exhibit 3, shown her, she had seen before (Rec., p. 68), and that the words above the lower double lines on pages 1 and 3 are in the handwriting of Mr. Florence.

Josephine Florence Sisson, a witness for cross-complainant, testified: She was a daughter of Annie Theresa Florence. Knew William J. Florence from the time she was nine years old, and looked upon him as her father. That she, her mother and Mr. Florence were always the best of friends. That Mr. Florence was an actor and her mother was an actress (Rec., 58 and 59).

(Rec., 59.) Had heard a conversation between Mr. and Mrs. Florence in regard to wills. It was during the month of May. I had called at the Fifth Avenue Hotel to see my mother. I know it was in the month of May, but I cannot tell the year. I went in the parlor with Christine. My mother and Mr. Florence came there on that occasion. They returned, and the first words my father said to me on entering the parlor was "Hello; we have both been down town and made our wills. I have left everything I own to your Mama." Mama made an answer and said yes, and when I die I have left everything to your Papa.

She further testified (Rec., p. 60): Had a conversation with Mr. Florence, or heard him say something on another occasion about a week before his death. It was at the Fifth Avenue Hotel, and was on the Sunday before he left for Philadelphia. He sent for me to come there to the hotel to eat breakfast with him. He told me he felt very badly—that he had caught a bad cold in Boston. He looked around the rooms and said, These rooms, these rooms. I said, Why do you talk like that?

He said, I feel badly, but if anything happens to me, Joe, your mother will have everything, and be well provided for.

Christine Narini; a witness for cross-complaint (Rec.p. 62). Remembers a conversation or talk or statement by Mr. and Mrs. Florence in regard to wills. Mr. Florence always said to her, don't worry, it will always be well with you. The day he went to make a will, when he came back he said everything had been fixed and arranged. Whenever they had any trouble he always said, well, it will be well for you. I don't think I shall live to be very old, and you have helped to earn this money with me. I remember the time when they came back from the lawyer's office. Mrs. Shepherd, now Mrs. Sisson, was present (Rec. p. 62). She was there when they came back. I have heard Mr. and Mrs. Florence say that whatever either of them had was to go to the other when either died. It was a great many years ago, but they said whichever should die first should leave it to the other (Rec. p. 63).

The wills of Mr. and Mrs. Florence were executed twice on the same day, the first time in the office of Mr. Richard H. Bowne the lawyer who drew them, and the second time in the Safe Deposit Vault of the Park Bank.

The first execution of the wills was witnessed by said Richard H. Bowne and one George W. Zener, both of whom were deceased at the time of the probate of the will of William J. Florence.

Their death and handwritings were fully proved.

See evidence of John S. Williamson, record pages 44, 45.
See evidence of James Cogan, record pages 51–53.
See evidence of Augustus L. Hayes, record pages 57, 58.

The second execution of the wills was witnessed by William H. Dakin, and Alfred P. Schultz, and their evidence showing the due execution of the wills is in the record in full.

See evidence William H. Dakin, pages 46–50.
See evidence Alfred P. Schultz, pages 53–57.

The genuineness of the signatures of the decedent William J. Florence to papers marked as "A. T. C. Cross bill Exhibit 1" and "A. T. C. Cross bill Exhibit 3"* being respectively the will of William J. Florence and the list of securities handed by said William J. Florence a short time before his death to

* See stipulation, Rec. p. 136 and Exhibits A. T. C. No 3. Rec., p. 19, and Florence Title, Rec. p. [illegible].

Mrs. Florence, was shown by Joseph S. Case, Cashier Second National Bank.

See evidence Joseph S. Case, record pages 50–51.

Why the wills were executed the second time appears in the evidence of the witnesses William H. Dakin and Alfred P. Schultz.

The competency of Mr. and Mrs. Florence to make wills and execute contracts at the time of the execution of these papers fully appears by the evidence of the same witnesses.

We respectfully submit that the agreement between Mr. Florence and Mrs. Florence (now Mrs. Coveney) his wife, as to the disposition to be made of their earnings as actor and actress, and as to the investments, and as to the agreement between them to devise and bequeath to each other all estate, real and personal, and such as each should die seized and possessed of wheresoever situated and of whatsoever description, and that they did make such mutual wills is clear and convincing, and there has been no evidence offered to contradict or in any way break the force of such testimony.

Mrs. Coveney testifies, as has already been shown by the extracts from her evidence, as to the agreement and understanding between herself and her husband, and this agreement was executed and performed by the execution of the wills of Mr. and Mrs. Florence in May, 1876, and which wills are in evidence.

Mrs. Sisson's evidence corroborates her mother's testimony, and from it we have the declaration of William J. Florence (her mother's husband), and of her mother at the time the wills were executed as to what they had done and the effect they intended to have their actions accomplish—to wit: that on the death of either, whatever property the other had should go to the survivor.

The evidence of Mrs. Coveney (formerly Mrs. Florence) was corroborated by Christine Narini, who testified, as has already been shown, to the declaration of Mr. and Mrs. Florence when they returned from the lawyer's office, and which declarations were as to the execution of the agreement which Mrs. Coveney (formerly Mrs. Florence) testified they had agreed to.

That Mr. and Mrs. Florence agreed to make, and did, in fact, perform the agreement for making, mutual wills by executing the wills of 1876, and that Mr. Florence so understood the transaction resulting in the execution of such wills is also clear from the statement made by him and given to Mrs. Florence (now Mrs. Coveney) in July, 1891, and which state-

ment contains the words "This is a corrected list of securities I give my wife July, 1891. W. J. Florence," and which list contains the property of both irrespective of the name in which the title stood, and which list contained a statement of the Washington property (in dispute), the record title of which then stood in the name of William J. Florence.

What reason could Mr. Florence have had for delivering this statement to Mrs. Florence, his wife, if he did not know and mean to declare the validity and form of the agreement for mutual wills and the passing of the property thereunder to the one first dying?

It is clearly shown that Mr. and Mrs. Florence (now Mrs. Coveney) did each make and execute a will in favor of the other in pursuance of the contract or compact between them.

In fact all the allegations of the cross bill of complaint and allegations in the answer to the original bill of complainant as to the agreement under which Mr. and Mrs. Florence acted from the time of their marriage were not only clearly proved, but stand practically unchallenged.

The following propositions are contended for by and on behalf of Mrs. Coveney.

I. That Mrs. Coveney (appellant) was a competent witness to testify in the case, and her evidence is admissible—notwithstanding the objections of appellees and opinion of the Court.

II. The Common Law rule that a wife's earnings belonged to her husband was abrogated in New York State by Chap. 90, Laws of 1860.

III. "Where she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she was a *feme sole.*"

IV. Under the laws of the State of New York a will speaks of the date of the testator's death, and under a will devising all of a testator's property, real and personal, it carries all his estate whenever acquired.

V. Mr. and Mrs. Florence were competent to make such a compact or agreement as Mrs. Florence claims was made and which the demurrer to the cross-bill concedes to have been made.

VI. Such a contract was valid under the laws of the State of New York, where the parties were domiciled and where in contemplation of such laws the contract was made, should be

considered valid anywhere, and even though the property situated in the District of Columbia might not pass under the will by way of devise, yet the Court should enforce the performance of the agreement between the parties which resulted in a will which the parties believed would pass after acquired property, and decree that those who, in case of an intestacy, would be the heirs at law of the testator and formally seized of the property, took the same as trustees for the contracting party who survived, and should convey the same to her, and thus carry into effect the intention of the parties to the contract and enforce the agreement made between them.

VII. The suggestion may be made that such an agreement is not enforceable in a Court of Equity, because of its lack of mutuality.

(*a*) This suggestion has no weight, because an examination of the facts shows that there was an agreement and that this agreement was a mutual agreement, to wit, that each should make a will in favor of the other, and the provision in each will in favor of the other party to the contract was a sufficient consideration for the execution of the wills and to sustain them.

VIII. Suppose Mrs. Florence had died first, and it appearing by the statement given to her by her husband and attached to the cross-bill that she owned real estate, and suppose that this real estate in her name had been situated in a State where after acquired property would not pass under a will executed before the property was purchased, what is it fair to assume would have been the attitude of Mr. Florence, and what would have been his rights? Simply that he would have insisted on and been entitled to have the contract or agreement between himself and his wife specifically enforced in equity.

(*a*) One of the grounds urged in such case would undoubtedly be that the compact being valid where made should be enforced wherever any property belonging to Mrs. Florence was situated, and that, too, irrespective of what the law might be in regard to the transfer or descent of the same by will.

IX. It may be suggested that such an agreement would be void because it took away from the person making it the right to revoke it and that one of the essential qualities of a will was that the person making it had the power to revoke.

(*a*) The answer to this suggestion is that it has been decided over and over again that where two persons make

wills in favor of the other and which are known as mutual or reciprocal wills the one revoking the will and otherwise disposing of his property would leave his estate burdened with a liability for the damages sustained by the other party to the compact for the mutual will.

X. It may be suggested that such a contract would take away the revocable character of a will and prevent one who had made a will pursuant to such an agreement, from disposing of his property as he saw fit; and, further, that the subsequent marriage of the one making such a will and birth of children or other circumstances might intervene to revoke the will in whole or in part by operation of law.

(*a*) To this it may be answered that so far as the will itself is concerned the party may take the risk of breaking his agreement or of having it broken by operation of some law which exists at the time the will is made, and though the will made pursuant to such an agreement may not operate or the title to the property go to the person named in the will, yet the estate taken by the person named in a will subsequently made in violation of the agreement or taken by the person upon whom the descent comes by operation of law is burdened with the claim for the damage sustained by the person with whom the compact for the mutual or reciprocal wills was made.

XI. The parties to mutual or reciprocal wills may by agreement cancel the same, but neither can do it secretly nor without the consent of the other.

XII. It has been suggested that there were no equities in favor of the contention of Mrs. Coveney in the cross-bill.

(*a*) This cannot be seriously urged, in view of the undisputed evidence that all the moneys and estate possessed by either at the time of death of Mr. Florence were the result of the joint efforts of Mr. and Mrs. Florence and were invested as they were found at the time of his decease in real estate and other securities, pursuant to the agreement made between them.

(*b*) Further, Mrs. Coveney was testator's wife, and after a wedded life of about forty years it is fair to presume that her claims in equity are equal at least to those of brothers and sisters and their descendants.

XIII. For the purposes of this discussion Mr. Florence and his wife must be considered as though they were separate in-

dividuals and fully capable of contracting with each other, and there is no principle better settled than the principle that where one gives to another the proceeds of his or her labor upon the promise of the person to whom the proceeds are given that they shall be invested for his or their joint benefit and to be the property of the survivor, that upon the death of either the survivor is entitled to the whole of the property and money, and especially is this so where in order to carry out this compact or agreement, the agreement is consummated as far as possible by each executing in favor of the other a will, giving to the other all that is possessed by or stands in the name of him and her making the agreement and will.

XIV. The agreement between Mr. Florence and Mrs. Florence, his wife (Mrs. Coveney), was a family arrangement.

In the case of Johnson vs. Hubbell, 10 N. J. Eq., 332, the Court held: "Agreements for family arrangement with respect to property are viewed with favor. They ought to be respected and scrupulously carried out by the parties to them; and if they are not, a Court of equity ought to enforce their execution."

Underhill on Wills, Sec. 292, says: "In many cases the Courts have dispensed with evidence of the usual formal execution of a contract, particularly where the parties dwell together in one family or household."

XV. The fact that Mr. and Mrs. Florence were husband and wife makes no difference in the disposition of the case, as under the laws of the State of New York, where the contract was made, where the parties were domiciled, and where Mr. Florence's will was probated, such a contract was valid and enforceable.

XVI. It may be suggested that the will of Mr. Florence gave everything to his wife and that upon her death she is under no obligation to give the property or any portion thereof to the heirs, executors, administrators or assigns of Mr. Florence.

(*a*) This is true, and for the reason that there was no such limitation of her power to dispose of the property included in the contract made between herself and her husband.

(*b*) The agreement was made and the wills were executed by each of them for the purpose of vesting in and securing to the other at the time of the death of the first

of the two contracting parties all that either might have to dispose of to the end that the survivor might dispose of it as he or she saw fit.

XVII. If, however, the will of Mr. Florence had been executed upon an agreement between himself and Mrs. Florence that Mrs. Florence should at her death make any special distribution of the property devised to her by her husband's will in consideration of the fact of his giving her such provision in his will as they might have agreed upon, then upon the death of Mr. Florence such agreement could not be modified or changed by Mrs. Florence without imposing upon her estate in the hands of whomsoever it might come, with or without notice, the obligation to perform that agreement and pay or transfer the property agreed to be paid or transferred and specified in the will.

XVIII. This would be no hardship upon Mrs. Florence's heirs at law or next of kin.

(*a*) Because what she might have received under her husband's will under such an agreement over what the law would have given her had he died intestate was a matter of agreement.

(*b*) Her heirs at law and next of kin, had she broken such agreement, would not be entitled to anything more than she was entitled to and would take what descended or passed to them subject to the same burdens that it came to her impressed with.

XIX. Mr. Florence's brothers and sisters, nephews and nieces were not entitled to anything as matter of right from him, and he had a legal right by contract or by will, without reference to any contract. to leave everything he possessed, so far as they were concerned, to the veriest strangers.

(*a*) Beyond a doubt he had a right to give all that he had to his wife and was more than justified in making such an arrangement in view of the fact that fully one-half of all he possessed was the result of her labor.

(*b*) The equities in her favor are stronger than they could possibly be in favor of his brothers, and sisters, nephews and nieces.

XX. There are no children or descendants of any child or children of Mr. Florence and his wife to be considered, and whatever the heirs at law or next kin of William J. Florence might have

received had he made his will in any other form, or died without leaving a will at all, or had he never made the contract which is proven to have been made, would have been the purest matter of favor or grace on his part or the act of law permitted by his grace in failing to make a will or contract disposing of his estate.

XXI. Mrs. Florence, having made the agreement (admitted by the demurrer to have been made), and having performed her part, is entitled to the property in the District of Columbia, and the fact that the will was dated in May, 1876, eleven years before Congress passed the Act which permitted after-acquired property to pass under a will executed after its passage, does not deprive her of her right to insist that the contract is valid everywhere, including the District of Columbia, and that though technically and at law the title to the Washington property descended to the heir at law notwithstandingthe will, yet the Court, sitting as a Court of Equity, will enforce the compact and agreement of the parties and declare the property to be impressed with the trust in favor of the complainant in the cross-bill and direct a conveyance thereof to the complainant in performance of the agreement between herself and her husband.

XXII. It is true that in many cases claims of agreements for mutual wills have not been sustained, but counsel for the appellant insist that in every case where the alleged agreements have not been sustained, it has been because of the uncertainty in the proof of the agreement and with a concession by the Court that such an agreement might be made.

XXIII. In this case we are not embarrassed by any failure of proof, because the agreement for a mutual will is beyond question shown to have been made and executed, and the only question for the Court to determine is whether the agreement being shown beyond question the Court will enforce the contract between the parties and specifically perform the terms thereof.

POINTS AND AUTHORITIES.

1st.

That appellant is a competent witness and her testimony is admissible.

2d.

We claim that it is proved that, before and after appellant's marriage to Mr. Florence, they were actor and actress, and that they agreed between themselves to continue to act as such and that the profits should be shared alike between them; and, further, whatever was invested should be invested by Mr. Florence for their joint benefit, and that such earnings belonged to her.

3d.

We also claim and the facts show that it was agreed by and between Mr. Florence and appellant that Mr. Florence was to invest the money earned by them for their joint benefit. That he did invest in real and personal property. That he was to, and did, consult her as to investment in real estate in New York City, Brooklyn and also the real estate in Washington, to wit, lots 23 and 24 in question in this case and, further she gave him money upon his request to be applied toward the payment of the Washington property, whether it was to pay a mortgage deed of trust or installment of purchase money. It is also shown that he considered the appellant—his wife upwards of 38 years his companion through fair and stormy nights in going and coming from the places where they as actor and actress tried to please the public—entitled to whatever property they should earn and accumulate. Those who attended the theatres in this City where they were acting will bear testimony with great pleasure to their grand acting.

Mr. Florence was under no obligation whatever—either moral or legal—to his brothers and sisters to leave his property to them—but was under both moral and legal obligation to his wife—she helped him to make it.

4th.

It must be manifest to the Court that there was a contract between appellant and her husband Mr. Florence, to wit, they had contracted with each other that they should share and share alike in the profits, and the profits should be invested in real and personal property; and, further, that they mutually agreed or contracted with each other to leave each to the other all estate, real and personal, and such as each should die seized and possessed of wheresoever and whatsoever.

It must be borne in mind that the agreement was a family arrangement between husband and wife and that strictness of proof will not be required as if it were between strangers.

In case of Johnson vs. Hubbell, 10 N. J., 332 and 487, the Court held: "Agreements for family arrangement with respect to property are viewed with favor. They ought to be respected and scrupulously carried out by the parties to them, and if they are not, a Court of equity ought to enforce their execution and that an agreement on good consideration, and without fraud or undue influence to devise land is valid and will be enforced by compelling a conveyance from the heirs of the promissor."

The above case of Hubbell vs. Hubbell, was where a father agreed, in the presence of his daughter, that if his son would execute certain deeds equally partitioning their mother's estate, that he (father) would leave all his own property equally to his children, share and share alike. At the same time the father declared that if his son refused, he would leave his estate to his daughter, which would make her share in both estates more than equal to his son's. In consideration of the promise of the father, the son agreed to make an equal division of his mother's estate between himself and his sister.

The Court held page 335, "There can be no doubt but that "a person may make a valid agreement binding himself legally "to make a particular disposition of his property by last will "and testament. The law permits a man to dispose of his own "property at his pleasure, and no good reason can be assigned "why he may not make a legal agreement to dispose of his "property to a particular individual, or for a particular pur- "pose, as well by will as by a conveyance to be made at some "specified future period or upon the happening of some future "event. It may be unwise for a man, in this way. to embarrass "himself to the final disposition of his property, but he is the "disposer, by law, of his own fortune, and the sole and best "judge as to the time and manner of disposing of it. A Court "of equity will decree the specific performance of such an

"agreement upon the recognized principles by which it is "governed in the exercise of this branch of its jurisdiction."

"In the case of Rivers against the Executors of Rivers (3 "Dessau Rep. 195) the Court, in sustaining the propriety of a "Court of equity's recognizing and enforcing such an agree- "ment, very properly remarked, that a man might renounce "every power, benefit, or right which the laws give him, and "he will be bound by his agreement to do so, provided the "agreement be entered into fairly, without surprise, imposition "or fraud, and that it be reasonable and moral."

In Izard v. Executor of Izard (1 Dessau Rep., 116) there is a note to the case, in which most of the old authorities bearing upon this subject are collected. "There are two classes of authorities there collected, one of which relates to the subject of agreements by two parties to make mutual wills in favor of each other, on certain contingencies; and the other, in which Courts of equity have decreed the specific performance of agreements connected with testamentary or other settlements."

The Court further said, page 338: "This agreement, then, "made between the complainant and his father was a legal "agreement. And this Court should decree its execution, if, "in the exercise of its legal discretion, it can do it without vio- "lating any principle of equity or doing injustice to any third "party who may be innocently involved in the transaction. "Generally, the agreement may be enforced without any em- "barrassment." * * *

"Several objections are made to the Court's decreeing a "specific performance in this case, in addition to the general "one which I have considered.

"*It is said, that this agreement was in parol, and is there-* "*fore contrary to the Statute of Frauds But although this* "*agreement was a mere parol one, if there was a part per-* "*formance of it, of such a character as, upon the principles* "*recognized and acted upon by this Court, will take a parol* "*agreement out of the statute, then there is nothing peculiar* "*about an agreement of this kind to exclude it from the opera-* "*tion of those principles.* If one party to a parol agreement "has wholly or partially performed it on his part, so that its "non-fulfilment by the other party is a fraud, the Court will "compel a performance. In this case, the son performed his "part of the agreement. He paid a valuable consideration, "and parted with his property. In fact everything was done "and performed by both parties that the character of the trans- "action would admit of. The part of the agreement which "the son was to perform was to be performed *in praesenti*, and "that part to be performed by the father was to be performed

"*in futuro*. There is no uncertainty about the agreement in "the slightest respect. It is definite and certain in every "particular. It is specifically set out by the complainant in "his bill, and the agreement, as alleged, is admitted by the "demurrer. There is no objection to a decree on the ground "of the contract not being in writing."

The Court on pages 336-7 after referring to the cases of Lord Walpole vs. Lord Orford, 3 Vesey, 402; 7 D. & E. 138, and Lewis vs. Maddox, 6 Vesey Jr., 150; Fortescue vs. Hannah, 19 Vesey, 71, and some other cases in England, said: "The authority established in all these cases has recently been very fully recognized in the House of Lords, in the case of Logan v. Wienholt (7 Bligh's R., 53, 54) and the substance of which is given as follows, in 2 Story's Eq., 786: If a person covenants or agrees, or in any other manner validly binds himself to give to A, by his will as much property as he gives to any other child, he may put it out of his power to do so by giving away all his property in his lifetime; or, if he binds himself to give to A as much as he gives to B by his will, he may, in his lifetime, give to B what he pleases, so as, by his will, he shall give to A as much as he gives to B. But then the gifts which he makes in his lifetime to B must be out and out. For if, to defraud or defeat the obligation which he has thus entered into, he gives to B any property, real or personal, over which he retains a control, or in which he reserves an interest to himself, then, in order to protect the agreement or obligation, and to prevent his escaping, as it were, from his own contract, courts of equity will treat this gift to B in the same manner as if it were purely testamentary, and were included in a will; and the subject matter of the gift will be brought back, and made the fund out of which to perform the obligation. At all events it will be made the measure for calculating and ordering the performance of and dealing with, the claim arising under the agreement or obligation."

B. In Davison v. Davison, 13 New Jersey Eq., 246, the agreement was in parol and proved by two witnesses. The testimony of these witnesses was "that the father declared that he should have the farm upon his death."

The Court said, page 252: "The agreement thus proved is "valid in law * * * and may be enforced in equity. That "the contract was by parol, and not in writing, while it greatly "increases the difficulty of proving its terms, constitutes no "valid objection to its enforcement. There has been a part "performance on the part of the complainant. He served his

"father several years upon the faith of the contract and, as "the evidence shows, faithfully and to his father's satis- "faction. Part performance takes the case out of the opera- "tion of the Statute of Frauds."

C. Dannelli v. Dannelli, 4 Bush (Ky.), -51. This case involved the effect of a will, question of legitimacy and of marriage, and what law governed and controlled the same.

"As by the laws of Kentucky she must be regarded as "legitimate, even if it were certain beyond a doubt that she "would not be so regarded in Lombardy, we are not bound, "by mere comity, to administer the canonical laws of the "hierarchy of that country, so flagrantly repugnant to the "genius of our American institutions and the laws and polity "of our own state."

D. Story, in his 'Conflict of Laws' (Section 479A), says as to wills: "The general rule of the common law is, that it is "to be construed according to the law of the place of his "domicil in which it is made."

And again (Section 479A), he says: "The same rule "applies to the ascertainment of the persons who are to take "under a will or testament; when it is made by the *words* "*designating a particular class* or *description of persons*, "*who are the proper persons to* take under *the designatio* "*personam* is a point *to be ascertained by the place where the* "*will is made and the testator is domiciled.* As, if a person "domiciled in England should bequeath his personal estate to "his heir-at-law, the eldest son would take; but if domiciled "in some of the American States, all the living children, and "those representing deceased children, would take; and if "domiciled in Holland, he should bequeath to the 'male "children,' and the question should arise whether descend- "ants claiming through male children were entitled, this must "be settled by the laws of Holland." And in Section 479h Story says: "The same rules of construction will generally "apply to wills and testaments of unmovable property, unless, "indeed, it can be clearly gathered from the terms used "in the will that the testator had in view the law "of the place of the *situs*. * * * So if a testator should "devise his real property to his next-of-kin, who would be en- "titled would depend upon the construction given to the "words by the law of his domicil." In this case, the law of both the testator's domicil and *situs* of real estate regard Aurelia as a legitimate child and heir of her father, James Dannelli.

Story shows the reasonableness of this rule of construction by supposing a testator had realty situated in three different countries, all differing as to the meaning of the term "children" or "heirs." Are the same words in the same instrument to have three distinct and different meanings attached, or shall the meaning attached by the laws of the domicil prevail? Would it not be reasonable to presume the testator knew the meaning attached by the laws where he resided, and used them in the same sense?

E. Wright v. Tinsley, 30 Missouri, 389. "On principle, there "would seem to be no ground to doubt that a person may, by "valid agreement, renounce the power to dispose of his prop- "erty at his pleasure; may bind himself to make a will in a "particular way on proper considerations; and that Courts of "equity would enforce such agreements under proper circum- "stances, the same as in other cases of valid contracts. While "in some of the cases cited the Courts refused to decree a "specific performance of the agreement, they all recognized "the power of individuals to make binding contracts of this "nature, and relief was denied on different considerations. "A contract to lease by will for a good consideration will be "enforced in equity (Newland Com., 111, 113). A contract, "says Story, to make mutual wills, if one of the parties has "died having made a will according to the agreement, will be "decreed in equity to be specifically executed (2 Story Eq., "785). And upon a like principle an agreement by a father "to give by will as much property to one child as another will "be enforced (*ib.*). In Harlem v. Battison, 1 Vern., 48, the "heir-at-law, pretending a right to the land in question, came "to the tenant in possession, who likwise claimed an interest "in the fee, and threatening to evict her at law, she made a "promise, if she died without issue of her body, either to "give a specified sum of money or leave him the land. The "tenant in possession died having devised her land to her "second husband, who had never any notice of the "former agreement. A bill was brought by the heir-at-law to "have this agreement enforced, and it was decreed against "the husband. The case of Lord Walpole v. Lord Orford (3 "Ves., 402) was the case of an agreement to make mutual "wills, and although its execution was not decreed because of "its uncertainty and vagueness, there was no question as to "the power of Courts of equity to enforce such agreements, "nor of their inclination to do so, where they were sufficiently "specific and on proper specifications.

"In Dufour, *et al.*, v. Pereira, *et al.*, Lord Camden (as "quoted by Hargrave in his judicial arguments, Vol. 2, p.

"310), says, that though a will is always revocable, and the "last must always be the testator's will, yet a man may so "bind his assets by agreement that his will shall be a trustee "for the performance of his agreement; as if he covenant "to leave so much to his wife or daughter, or if he make "a will and covenants not to revoke it, are common "cases; and there is no difference, he remarks, between "promising to make a will in such a form and making his will "with a promise not to revoke it. The will is not set aside, "but the devisee, heir or executor is made a trustee to perform "the contract. See also the case of Casey v. Felton, referred "to in the same book, 297, in which the contract enforced was "a contract to devise (Fry, Spec. Per., 298.)

"In Rives v. Executors of Rives, 3 Dessaus, Eq., 194, the "agreement was made by the trustees in contemplation of "marriage, and among its stipulations was one that the in- "tended husband, in case the wife survived him, would be- "queath to her by will a competent and sufficient maintenance "during her life. The provision left by the will of the hus- "band not being satisfactory and not being deemed a sufficient "maintenance, upon a bill filed, it was held inadequate, and "the Court, by its decree, enlarged it. The Chancellor, Des- "sausure, in delivering his opinion, observes, that 'the hus- "band, by the agreement had renounced the absolute power of "disposing of his estate at his pleasure, or even at his caprice, "with which the law had clothed him; and I cannot doubt "that he could bind himself to do so.' Alluding to cases of "agreement to make mutual wills in a particular way, he re- "marks, that in these cases Courts of Equity have held the "parties bound, and have made the estate of the party, who "did not comply with the agreement, liable to the other party "who had complied, on the happening of the event which "entitled him to the benefit. He also cites as analogous in "principle the case of a father promising, in consideration of "the marriage of a child, to leave such child a legacy, which "had been held binding on his estate after his death when he "had neglected to provide; and adds that, independently of "any preceding decision he shonld feel no hesitation to decide "this point on principle."

F. Gupton v. Gupton, 47 Missouri, 37. "That an agreement "to dispose of property by will in a particular way, if made "on a sufficient consideration, is valid and binding, is settled "in this State by Wright v. Tinsley, 30 Mo., 389, where the "subject is considered at length and the authorities reviewed.

"The Statute of Frauds is set up as a defense, inasmuch as "the original agreement was not made in writing. But this

"defense will not avail for the obvious reason that the contract "was in a great measure performed by both parties." * * *

"Ordinarily it is the case that the remedial justice of a Court "of equity as administered by a decree for specific perform- "ance, is invoked where the agreement respects lands, and where "such agreement in any other forum would be held void, as in "contravention of the statute of frauds. But the jurisdiction "of Courts of equity ls by no means circumscribed within such "narrow boundaries. That beneficient jurisdiction is called "into activity on numerous other occasions, where, but for its "timely exercise, there would be either a partial or else an "entire failure of justice.

"Thus, although the statute requires wills to be in writing "(Wagn. Stat., 1364, Sec. 3), equity will specifically enforce a "parol contract made upon sufficient consideration to dispose "of property in a particular way by will (Wright v. Tinsley, "30 Mo., 389). And a verbal agreement of this sort in case of "part *performance*, will authorize a decree, giving that "agreement full force and effect (Gupton v. Gupton, 47 Mo., "37). * * * In Brinker v. Brinker (7 Penn. St., 53), an "agreement of this character was upheld, not because of deliv- "ery of possession of the property contracted to be bequeathed, "but because in conformity to the agreement the will had been "executed. In Goilmere v. Battison (1 Vt., 48), the tenant "in possession agreed with the heir-at-law, who had threat- "ened to evict her, that if she died without issue of her body, "she would either give him £500, or leave him her land. She "failed in any way to comply with her agreement, and died, "having bequeathed her land to her second husband who took "without notice. Yet, on bill brought by the heir-at-law, the "agreement was enforced against the husband. So, also a "contract to make mutual wills will be enforced in one if the "parties has died, having made a will in conformity with the "contract and the survivor has enjoyed the benefit of the will "thus made. (Sto. Eq. Jur. Sec. 785; Dufour v. Pereira, "cited in Walpole v. Orford, 3 Ves. Jr., 412; Newl. on Conts., "ch. 6, p. 111; Hinckly v. Simmons, 4 Ves. Jr. 160). And "the fact that a will is ambulatory until the death of the tes- "tator does not all prevent the prevalence of the equitable rule "which the above authorities enunciate. For it is competent "for a person to bind his assets by his agreement, and his will "in such case is the trustee for the performance of that which "he has contracted."

"In the case before us, however, we are not without author- "ity, that the mutuality was co-existent with the commence- "ment of the services rendered. (Gupton v. Gupton, supra.)

"But were this otherwise, the authorities we have quoted

"in respect to mutual wills appear to convey the idea, that the "rule as to mutuality being an essential ingredient in contracts "whose enforcement is sought, finds an exception in cases of "that character because it would be obviously impossible to "enforce a contract of that nature at the time of its formation. "And by parity of reasoning, could we not, if necessary, in- "voke a like exception here? For those cases evidently pro- "ceed, not on the theory of the original enforceability of the "contract, but on the ground that it would be highly inequit- "able to allow a surviving party to enjoy the benefit of a be- "quest, while refusing to conform to the contract on his part "to make a like testamentary disposition of his property.

"Another mark of distinction is to be observed between this "case and ordinary proceedings for specific performance. In those "cases the precise property intended to be conveyed must be "alleged and proven, while in cases like the present, it is "sufficient to show a valid agreement to convey whatever "property may remain at the death of the party contracting "to convey. So that authorities cited in behalf of defendants, "though clearly applicable to cases where specific performance "is asked as to a particular tract of land, as having been ex- "pressly contracted for, have no application here."

H. Sherman v. Sherman, 20 District Columbia Reports, page 330.

This was a case where a husband agreed with his wife that he should buy real estate and take title in her name, and that she should execute a will devising it to him after her death. The husband bought one piece of property, and the wife executed a will, devising "her estate" after her death. He bought another piece of property which was the subject of the suit.

The husband and wife believing that the will covered after acquired property, did not make any further or new will, and died intestate as to the second piece of property, and it descended to her daughter, an infant. The father filed his bill, practically for a specific performance, and to have the daughter decreed to hold the property in trust for him. The Court at Special Term so ordered and adjudged, and the plaintiff sought to sell the property, when the Real Estate Title Company objected that the Court had no jurisdiction to make the decree above referred to.

The father having had the decree at Special Term made, could not appeal, and so a bill was filed on behalf of his minor daughter in the nature of a bill of review to set aside the decree of the Special Term, and the case was certified to the

Appellate Court to be heard in the first instance. The Court, after speaking of the question of jurisdiction, said: "Now, "assuming that the Court then had the jurisdiction, was there "any error in the Court's decree? There is no doubt that "such a contract as the bill sets up would be null and "void at common law, and it would not be aided by the Mar-"ried Woman's Act in force in this District because it is a con-"tract not in relation to the separate property of the wife at all, "but a contract as to future property, and that future property "was to be acquired by her from her husband. But Courts of "equity recognize the capacity of man and wife to contract "with each other, and will sustain certain contracts, if made "for a valuable consideration, appearing to be for the mutual "benefit of the parties."

And on page 334 the Court said: "We do not see any error "in the decree at Special Term, and the bill of review, there-"fore, must be dismissed."

I. It was verbally agreed between the father and a son that the son should convey to the father a lot of land, and that in consideration therefor, the father should devise to the son two other lots of land. The son conveyed his lot to the father, and the father devised his two lots to the son; but the will, by which he did this, had but two witnesses to it, and was, therefore, void. Bill was filed against other heirs at law.

Testator was ignorant of number of witnesses required to will in Georgia.

Held, that the son was entitled to have a specific performance of the contract from the representatives of the father.

Maddox v. Rowe, 23 Georgia, 431.

J. Anding v. Davis, 38 Miss., 594.

"But, independently of these considerations, these objections "are obviated by the facts stated in this bill. The bill alleges, "in effect, that it was agreed between the parties that Anding "should execute and keep on hand a will, reconveying the "property to the complainants on the payment of the money "intended to be secured by the deed; that this agreement was "complied with by him, but that either he destroyed the will "in his lifetime, or that it has never been produced by his "representatives, if in existence. If these allegations be true "—as upon demurrer they must be taken to be—there was a "compliance with the agreement on his part in writing; "and the destruction of the instrument by him, or its sup-"pression by his representatives is such a fraud as would

"entitle the complainants to relief on that ground, in a Court "of equity. He was bound, as a matter of compact, to execute "and keep a will reconveying the property; from which he "and his representatives cannot claim to be absolved on the "ground that it was to be done by will, which is generally "revocable. For the contract was that he should perform his "agreement in that manner. Upon that consideration in part "and for that purpose he had received the deed, and the agree- "ment had the force of a contract; and the will, when executed, "was, as to this property, irrevocable. If not executed, he "was thereby bound for the consequences of a violation of the "contract, for which he had received a valuable consideration. "In this respect the case is fully within the principle of "Fenton v. Emblers, 3 Burr., 1278; and Dufour v. Pereira, 1 "Dick, 419.

"Nor is this equitable right secured to the complainants, im- "paired by the fact that the will—the instrument of reconvey- "ance, and the evidence of the agreement—was to remain in the "possession of Anding. For after its execution, as agreed on, "he had no right to destroy it, without a violation of his "agreement. His retention of it was a part of the agreement "which he had undertaken, and which he was bound to ob- "serve. If he executed, and afterwards destroyed it, then it "was a violation of his agreement. But if he failed to execute "the will, that was also a violation, of his agreement and a "fraud upon the grantor and his children, which, according to "all authorities, will entitle them to the benefit of the agree- "ment in equity, against him and his representatives, as "though he had kept it in good faith. (Hill on Trustees, 60, "166; Jonham v. Child, 1 Bro. Ch. Rep., 92 (1 Amer. Edit. by "Perkins), and numerous cases cited in note B.)"

K. In Fry on Spec. Perf. 3 Eng. Ed., Sec. 245, it is laid down as follows: "Contracts to devise lands have been enforced "against persons claiming them under the party contracting to "make the will."

L. Mutual Life Ins. Co., vs. Holloday, 13 Abb. N. C., 16.

In this case the action was brought to declare a will of one N. A. C. H. to be void under the following circumstances. The husband of H. being the owner of a farm in 1871 entered into an agreement with her to convey to her through a third party the farm; upon her executing at the same time a will devising the farm to him in case he survived her.

The farm was conveyed and the said N. A. C. H. made a will giving all her estate to her husband, subsequently and shortly before her death N. A. C. H. executed another will

making an entirely different disposition of her estate. In 1883 the will made pursuant to the agreement with her husband was admitted to probate and the second will giving the property contrary to the agreement was rejected upon the ground that she being of unsound mind it was void. Thereafter the husband borrowed money on the farm and gave as security therefor a mortgage thereon. This mortgage was subsequently foreclosed and bought in by the plaintiff, the mortgagee, but he has been unable to dispose of the property by reason of the adverse claims of title asserted by or on behalf of the devisees under the second will. The Court held, page 19:

"That the agreement between N. A. C. H. and her husband was valid and should be upheld in this Court; and that the rights and interests intended to be secured thereby should be adequately protected and secured to the extent that a Court of equity has ability to act."

The Court, pages 19 and 20 referred to the case of Sherman vs. Scott under the name of Sherman vs. Butts, and on page 21 said in regard to that case:

"The agreement in that case, as in this, was between the husband and his wife and was by parol. The agreement was that the husband should convey certain real property to his wife, and on her part it was agreed that she would devise the real estate to him in case he should survive her. It was held in that case, that the existence of the marital relation interposed no objection in equity to the validity of the agreement, and the rights intended to be secured to the husband by the parol agreement were fully recognized and enforced in the action."

And on page 24 and 5 said:

"If the agreement was valid in law and in equity, it would be a mockery of justice to say that having executed the will, she fully satisfied her part of the agreement, and was at liberty to revoke it the next day. The right secured by her husband was substantial, and could not be defeated by another will. The spirit and true intent of the agreement under which she became seized of and enjoyed the estate obliged Mrs. Holloday to adhere thereafter to the terms of the devise in her husband's favor. And as the agreement was to the extent above mentioned executed at the time, the inhibitions of the Statute of Frauds against the admissibility of parol evidence as to contracts concerning the sale or disposition of land have no force. That subject is, however, fully considered in Sherman vs. Butts, which must control the decision here."

And again on page 25 the Court said:

"Indeed the doctrine of the revocability of a will amounts merely to this, that a will is ambulatory during the lifetime of the testator, provided he has not bound himself not to change it" (1 Jarman on Wills, 5th Am. Ed. by Bigelow, 18, note). The above quotation is a summary by the learned editor, from the cases which he has reviewed and to which he refers.

"The absolute right to dispose of property, as the testator may elect at any time during life may be abridged or modified by express contract, as other rights often are. And the obligation not to revoke or change a will, although negative, is as much involved in the agreement as the affirmative duty to devise in a certain way.

"This is not an action for the specific performance of the agreement between the defendant Ben Holloday and his wife. Upon the principles above stated, such an action, had it been necessary, could have been sustained."

M. Kenyon vs. Youlen, 53 Hun, page 591–2:

"In an action of ejectment it appeared that the premises consisted of a house and lot, which were owned by Mary Piper, deceased, in her lifetime, and that the plaintiffs claimed as the devisees under her will, and the defendant as the equitable owner under an agreement between the decedent and the defendant and one George V. Piper, whereby the decedent agreed to convey or devise the premises to them in consideration that the defendant and Piper would move onto the premises and take care of the decedent during the remainder of her life.

The defendant having fully performed on her part demanded judgment for the specific performance of the agreement.

Held: That the defendant was entitled to specific performance of the contract and to assert her right of possession as a defense to this action.

That the fact that the contract in this case was an oral one did not bar the defendant's right to enforce specific performance as the Statute of Frauds was not applicable to such a case."

N. In Godin vs. Kid, 64 Hun, page 585, Court said:

"As already stated there is abundant law to sustain the view that where a certain and definite contract is clearly established, even though it involves an agreement to leave property by will, and it has been performed on the part of the promisee, equity in a case free from all objections on account

of the adequacy of the consideration, or other circumstances rendering the claim inequitable, will compel specific performance."

O. See to same effect Gall vs. Gall, 64 Hun, 600.

P. In Parcell vs. Stryker, 41 N.Y., page 480, the Court said, page 486:

"As to plaintiff's equities, it made no difference whether the agreement was to deed the farm at a future day, on performance by plaintiff, or to devise the farm by a will made in the lifetime of the party, a Court of equity will decree the specific performance of the latter agreement after death, where otherwise unobjectionable equally with a contract to convey while living."

Q. Schutt vs. Missionary Society, 41 N. J. Equity 115.

In this case Godfrey Schutt, an uncle of the plaintiff lived in New Jersey in 1869 and the plantiff lived in Germany at the same time. In 1879 the said Godfrey Schutt wrote to his nephew a letter as follows:

"Dear Nephew:—For a long time I have expected a letter from you but have expected in vain. I have, nevertheless, kept on hoping you would come to us and with your family, earn your living here with us. I do not know how much or how little you now earn, but I am sure of this however, that you can earn ten times as much here, as you can earn in Germany. My brother John once wrote me that I must not forget my heir (meaning you, perhaps), but I will send no money to Wolgast. If you want to be my heir, you must come to me, and that very soon, for I and my wife are both old, and I especially am very feeble. But if you do not come—do not want to come—you cannot be my heir, and in that case my estate will fall into other hands. If you conclude to come and it does not please you here, I will pay your expenses and returning. Be so good as to give me your answer as soon as possible, or better still, come yourself with your family. When you arrive in New York write to me at once from the vessel, and if health permit, I will meet you."

The nephew came to this country, lived with or near the said Godfrey Schutt until the time of his death in 1879 and gave him personal attention and care like a son. The nephew meanwhile supporting himself and family, paying rent to his uncle for part of a house which he occupied belonging to his uncle. The uncle at his death left a will, which after giving $100 to one Laura Gilbert, gave the residue of his estate to the

Missionary Society and the plaintiff filed his bill to enforce a performance of the contract.

The Court held he had a good cause of action.

R. Sharkey vs. McDermott, 91 Mo., 647.

This was a case where a man and wife agreed to adopt plaintiff as their child; to provide and care for her and at their death leave her their property. Plaintiff fully performed the contract while living there and obeying the husband and wife as her parents, receiving her wages, and they partly performed the contract during a number of years. The husband died leaving the property to his wife, and the plaintiff continued to live with the wife until she died intestate. The plaintiff claimed the property under the agreement.

The Court said, pages 654–5:

"But the rights of plaintiff, if any, in this case, do not spring either from the general law, applicable to parent and child, or from said statute authorizing the adoption of children, for the reason that plaintiff was not the daughter of these parties by nature; nor had she been formally adopted by them by deed duly executed, as the statute requires. Her rights in the premises, if any, depend, we think, entirely upon said agreement, and the action had thereunder by the parties thereto. This agreement was not merely and solely one to adopt the plaintiff, but was in part to leave the plaintiff the property at their death. * * *

The question then, is, whether this is a valid agreement executed upon sufficient consideration, and whether, being wholly performed by plaintiff, a party thereto, she is not entitled, upon the death of said James and Catherine McLaughlin, without performance thereof on their part, to a specific performance of the contract and to hold and enjoy the property so contracted for, at their death, as against these defendants, who are the brothers and sisters of the said Catherine, deceased. If such a contract may lawfully be made by the parties, then the parties defendant to this suit stand in relation of heirs-at-law, if anything, to the estate of the decedent, whilst the plaintiff, having performed the services and yielded the obedience required of her by the contract, and having fulfilled the same, has the paramount claim of a creditor, or equitable owner of the property contracted to be given her in consideration of her said services.

We see no valid and sufficient reason why the case should not be controlled by the principle and rule laid down by this

Court in Wright v. Tinsley, 30 Mo., 389; Gupton v. Gupton, 47 Mo., 37; and Sutton v. Hayden, 62 Mo., 101.

S. Roehl, Administrator vs. Haumesser, 114 Ind., 311.

This action was brought to enforce a claim against the estate of a decedent based on an offer of one F. to claimants' mother, in which he proposed in effect that if her daughter would come and live with him, do the housework and take care of him and his wife, he would devise and bequeath to her one-half of the estate. A letter in reply was sent accepting with a condition which was agreed to by the decedent and the claimant came and lived with the decedent and his wife. The letters were lost but their contents proven. As in this case, a demurrer to claim was overruled and the Court after sustaining that and stating the fact that this was not a case where the agreement existed by parol said, pages 317:

"Since the chief incentive to the acquisition of property is the right that every man has to dispose of that which he accumulates in the manner he may judge best, it has been well said that: "It is not only in harmony with sound principle that a person may make a valid agreement binding himself to dispose of his property, in a particular way, by last will and testament, but it is supported by an almost unbroken current of authorities, both English and American." (Johnson v. Hubbell, 66 Am. Dec., 784, note).

If such an agreement is in writing, so as to satisfy the Statute of Frauds, or if it has been performed in such a manner as to be taken out of the operation of the statute, an action for its specific enforcement may be maintained, or an action for damages may be maintained in special cases. (Wright vs. Tinsley, 30 Mo., 389; Gupton vs. Gupton, 47 Mo., 37; Wallace vs. Long, *supra.*)

T. Walpole vs. Orford, 3 Vesey Jr., 402, is no authority against the decision of the complainant in this bill. That case did not decide that a contract such as is claimed in this case was not good and could not be supported by common law evidence, but was determined, as appears by a note to the case, page 402, on the uncertainty, and in some sense the unfairness of the alleged compact. As appears on page 415, the prayer of the bill was for the payment of legacies, and it appears that the issues in regard to whether or not there had been a claim for reciprocal wills had been disposed of at law.

The Chancellor in his opinion referred to the case of Dufour vs. Pereira, 1 Dickens, 419, and in regard thereto, page 417, said: "Lord Camden was very properly of the opinion that

he must judge according to the law of England where they had long resided, and taking it to be very advantageous to the surviving party, he determined that she was bound, and that her husband's will must rule hers; she having enjoyed all the benefit, and the will being perfectly defined. It was a most minute, distinct and particular engagement to each other what should be done after the death of each and of the survivor." * * * "Lord Camden's argument applied to the objections that might be raised by the defendant. I do not dispute his principles. They are just, where they apply."

U. In the case of Whitney vs. Hay, 15th Appeal D. C., 186, this Court laid down the rule governing the quality of evidence required to sustain such agreement. The Court says the certainty of proof required is not absolute, but reasonable * * * This means the Court will look to the situation and declaration of the promisor, the relation of the parties and surrounding circumstances as disclosed by all the testimony in aid of the direct evidence. This case was affirmed by the Supreme Court of the United States, 181 U. S. R., 77.

V. See also Smithsonian vs. Meech, 169 U. S., 398.

W. In Heath v. Heath, 18 Misc., 521, *Laughlin, J.*, the Court said: Orin Heath's parol agreement that the plaintiff should, at his death, have all his property, subject to the interest of his widow made in consideration of the adoption of the plaintiff and her living with him as his daughter was valid and imposed a trust upon such property, binding upon the heirs, devisees and even purchasers with notice, which is enforcible in a Court of Equity. (Gall v. Gall, 64 Hun, 601; 19 Abb. N. C., 19, and note; Godine v. Kidd., 64 Hun, 585; Sherman v. Scott, 27 *id.*, 331; Parsell v. Stryker, 41 N. Y., 480; Schott v. Missionary Society, 41 N. J. Eq., 115; Roehl v. Haumesser, 114 Ind., 311; Sharkey v. McDermott, 91 Mo., 647).

X. Dufour v. Pereira, 1 Dick., 419: "The case on which the "principal question arose, stood thus: Mrs. Camilla Rancer, "the wife of Rancer, being entitled to a legacy under "the will of her aunt, she and her husband agree to make a "mutual will, which they do, and both execute it. The husband "died, the wife proved his will, and afterwards made another "will. And the question was, whether it was in the power of "the wife, to revoke the mutual will. Lord Camden, C.: "This question arises on a mutual will of the husband and "wife, the will is jointly executed by them. What a wife dis- "poses of is the residue of her aunt's estate to her by her

"will. I do not find the cases go so far, as to consider a "legacy to a wife, as excluding the husband by implication, "but there is no occasion to determine that question. The "question is, as the husband by the mutual will assents to his "wife's right, and makes it separate, whether the second will "by the wife is to be considered as void. It struck me, at "first, more from the novelty of the thing than it's difficulty. "The case must be decided by the laws of this country. The "will was made here, the parties lived here, and the funds are "here. Consider how far the mutual will is binding, and "whether the accepting of the legacies under it by the sur- "vivor is not a confirmation of it.

"I am of the opinion it is.

"It might have been revoked by both jointly; it might have "been revoked separately, provided the party intending it had "given notice to the other of such revocation, But I cannot be "of opinion, that either of them could, during their joint lives, "do it secretly; or that after the death of either it could be "done by the survivor by another will. It is a contract be- "tween the parties, which cannot be rescinded, but by the "consent of both. The first that dies carries his part of the "contract into execution. Will the Court afterwards permit "the other to break the contract? Certainly not. The defend- "ant Camilla Rancer hath taken the benefit of the bequest in "her favor by the mutual will; and hath proved it as such; "she hath thereby certainly confirmed it, and therefore I am "of the opinion, the last will of the wife, so far as it breaks "in upon the mutual will, is void. And declare that Mrs. "Camilla Rancer having proved the mutual will, after her "husband's death and have possessed all his personal estate, "and enjoyed the interest thereof during her life, hath by "those acts bound her assets to make good all her bequests "in the said mutual will; and therefore let the necessary "accounts be taken."

Y. Sherman vs. Scott, 27 Hun, 331.

The Court said, page 333: "*It is insisted on the part of the "appellants, as it was at the trial, that the agreement, being "in parol, is void under the Statute of Frauds. The answer "is that made by the Judge at Special Term, that as the agree- "ment was fully performed by the husband, to permit the "wife, or the appellants, who are her heirs, to keep the fruits "of the agreement, she not having performed on her part. "would amount to a gross fraud upon the plaintiffs. A "Court of equity will not permit the statute, which was de- "signed to prevent frauds, to be used as an instrument for*

"*perpetrating a fraud with impunity.* (Ryan v. Dox, 34, "N. Y., 307) and cases cited.

Z. *Ex parte* Day, 1 Bradford, 476. The Court said, page 476: "An agreement to make mutual wills appears to be valid and, "after the death of either of the parties, irrevocable."

AA. In the Matter of the will of Frederick Deiz, 50 N. Y., 88, the Court said, page 94: "The fact that by the same instru- "ment the husband and wife devised reciprocally to each "other, or, in other words, it was a mutual will, does not de- "prive it of validity. There is no just objection to such a "form of testating. The instrument operates as the separate "will of whoever dies first. Here, the husband having died "first, it can be proved as his will and the efficacy of his dis- "positions is in no way impaired by those portions of the "instrument which, if the wife had died first, would have con- "stituted her will but which have now become inoperative. "The result is precisely the same as if like reciprocal disposi- "tions had been made by the husband and wife by means of "two separate instruments. The combining of such reciprocal "dispositions in one instrument is sanctioned by several "authorities."

AB. Edson vs. Parsons, 155 N. Y., Rep., pages 566–7, the Court said:

"I fully concede that there is no reason in law, nor any public policy, which stands in the way of parties agreeing between themselves to execute mutual and reciprocal wills; which, though remaining revocable upon notice being given by either of an intention to revoke, become, upon the death of one, fixed obligations; of which equity will assume the enforcement, if attempted to be impaired by subsequent testamentary provisions on the part of the survivor. The proposition is one that may be regarded as having been accepted generally. (1 Jarman on wills, 27; 2 Story's Eq. Jur. Sec., 785; Schouler on wills, 454; Lord Walpole's Case, 3 Vesey, Jr., 402). A Court of Equity would, in such an event, proceed upon the ground that the survivor was bound, not merely in honor, but by his agreement and by the acceptance of the benefit, which that agreement procured for him. In such a case, obviously, no remedy at law would be adequate to the party, in whose interest and for whose ultimate advantage, the testamentary agreement had been entered into. Therefore, equity would perform its high function of supplying the relief, which the rules of law are not sufficiently elastic to comprehend, and recognizing the obligation, which, in conscience and in honor, rested upon the sur-

viving party, would decree a specific performance of the testamentary agreement, by compelling those persons, into whose passession the property affected might have come, to account for and and to deliver it over to the complainant, for being impressed with a trust in his favor. But equally would it be the duty of a Court of Equity to refuse that relief, where the agreement sought to be given effect was not certain and definite. Clearly, it should hesitate to assume the grave responsibility of implying an agreement, whose existence depends upon circumstances, inconclusive of their nature and permitting an inference either way. It is not essential to the intervention of equity, in order to prevent an accomplishment of fraud, that an agreement should be established by direct evidence. It may be established from such facts and circumstances as will raise an implication that it was made; and may have reinforcements from the evidence of the conduct of the parties at the time and subsequently."

AC. "In cases of wills obtained by a promise to dispose of the "property in a particular way, the Court will notwithstand-"ing the language of the Statute of Frauds, that every will "must be in writing, and the language of the wills act to the "same effect, give effect to the verbal arrangement by raising "a trust on the property devised or bequeathed by the will."

The part performance of a contract by one of the parties to it may, in the contemplation of equity, preclude the other party from setting up the Statute of Frauds, and thus render it, although merely resting in parol, capable of being enforced by way of specific performance.

Fry Spec. Perf , 3 Edition with American Notes, Sections 554-555.

AD. Shouler on Wills, page 464, Sec. 454, says, Courts of Equity hold, that where one contracts upon valuable consideration to execute a will after certain tenor, the agreement, upon his death, may be specifically enforced against his representatives and his estate.

AE. Again, it is well settled that contracts *inter vivos*, for the granting or devising of property by one dying first to the survivor, when clearly clearly proved and upon sufficient consideration are valid and will be enforced.

Fenton vs. Embler, 3 Burrows, 1278.
Rhodes vs. Rhodes, 3 Sandford Chan., 279.
1st White & Tudor Leading Cases, Eq., 625-719.
1st Story, Eq. Jur., Sec. 781.

The due and formal execution of such agreements in family matters will not be required, as between husband and wife as would be required between strangers. Mr. and Mrs. Florence by their hard labor as actor and actress no doubt accumulated the money, with which this property was purchased, Why then deprive her of it and give it to the brothers, sisters and nieces of Mr. Florence, when they did not by labor or otherwise put a cent in the purchase of the property.

By the rule of this Court the opinion of the Chancellor holding equity No. 1, is made a part of the record in this case, and with all due respect for the Chancellor, we deem it our duty to call the attention of this Court to what we consider to be errors and mistakes in his opinion as to the facts of the case.

Comments on Mr. Justice Hayner's Opinion.

A.

In the opinion he refers to the Act of Congress and says: "The act referred to provided (Rec., p. 119) that any will thereafter executed from which it shall appear that *it was the intention of the testator to devise property acquired after the execution of the will* shall be deemed, taken and held to operate as a valid devise of all such property. But the act is expressly prospective in its terms, and could not govern a will previously executed, and no such intention clearly appears from the language used in the will." "Assuming in behalf of the widow that the provisions of the will devising all the testator's property wheresoever and whatsoever would pass after acquired real estate situate in the State of New York, the contention of her counsel that it would be equally effective within the District of Columbia, cannot be sustained."

We respectfully submit that counsel for appellant did not claim that the will of Mr. Florence *as a will*, or that the will of Mrs. Florence as a will would pass after acquired property in the District of Columbia as the wills are dated 5th May, 1876, and the Act of Congress providing that a testator might by his will devise after acquired property was not passed until Jany. 17, 1887 (24 Stat., p. 361, Chap. 25, Sec. 2). But we did claim and do claim that Mr. and Mrs. Florence entered into a contract to make mutual wills, to give and devise to each other all estate real and personal each of them had and such other estate real and personal as each should die seized and possessed of wheresoever situated and whatsoever kind it might be.

It is true the laws of New York allowed a testator to devise after acquired property, the same as our present law of the District of Columbia does, and there can be no doubt that when Mr. and Mrs. Florence entered into the contract to make the mutual wills each thought it would carry after acquired real estate in any other place or places or why use the words, "*wheresoever and whatsoever.*" They certainly meant real estate and personal estate wheresoever situated and whatever kind it might be at time of their death, that is to say, in any State or territory outside of New York as well as within that State. Mr. Bowne, their attorney, must have been of the same opinion, or he as a lawyer would have told them the wills would not pass after acquired real estate in other jurisdictions where such real estate would not pass acquired subsequent to date of wills. Again suppose for instance that such a contract had been made as claimed by appellant after the passage of the act of 1887, and there were only one or two witnesses to the will, whereas the law required three witnesses to a will to pass real estate, the will would be void as to real estate, yet the contract under which the wills were made would be a good contract and enforceable in a Court of equity.

In Maddox vs. Rowe, 23 Ga., 431, it appeared it was verbally agreed between father and son the son should convey to the father a lot of land and that in consideration therefor, the father should devise to the son two other lots of land. The son conveyed his lots to the father, and the father devised his two lots to the son, *but* the *will* by which he did this only had two witnesses to it and was therefore void.

Held, that the son was entitled to have a specific performance of the contract.

B.

Again Mr. Justice Hagner held that said contract or wills (if we understand the opinion) does not convey after acquired property, because, he says (Rec., p. 119): "No such intention clearly appears from the language used in the will before us."

Each of the contracts or wills (Rec., p. 14 and Rec., p. 18) gives, devises, &c., "all my estate, real and personal and such as I shall die seized and possessed of wheresoever and whatsoever." This language certainly means—I give all my estate —real and personal that I have and such estate real and personal I shall die seized and possessed of wheresoever situated or whatsoever kind.

The word "seized" is used to express seizen or owner's possession of freehold property."

Black Law Dictionary, p. 1075.

It must be manifest the contract meant all real estate of which the party should die seized.

C.

Again the Court in its opinion (Rec., p. 121) speaks of revocation of mutual wills.

We again submit there was no question before the Court as to revocations of wills.

If the contract was to make mutual wills and they were made—and one of the parties revoked it without consent of the other party, the person so revoking would no doubt be liable.

This is shown by the Court's citations, to wit (Rec., 121), quoting Page on Wills: "If the joint or mutual will is not made in pursuance of any contract, the right of the testator to revoke it is beyond question. If made in pursuance of a contract between the testators, such *will* stands on the same footing as any *will* made in pursuance of a contract, not a joint or mutual will; that is, the will itself may be revoked, but the contract in pursuance of which the will was made may be found in an action at law for damages, or in a suit in equity to have those taking the legal title after the death of the promisor held as trustees.

This is a proposition of law for which we contend and claim that all the facts and surrounding circumstances in this matter between husband and wife show that appellant was to have all the property of which Florence might die seized and possessed

D.

Again in his opinion he cites with approval (Rec., p. 121) Page on Wills, Section 71. "When such wills are enforceable as valid contracts they do not stand upon any especial favored footing. In order to be enforceable they must have all the essential elements of any valid contract. There must appear to be a valid consideration. *And a promise by one to make a will in consideration that another shall make a specific disposition of his property has been held to be sufficient and valid consideration.*

In this case not only have we the testimony of appellant that she and Florence were married in 1853 and lived together for 38 years, worked together as actor and actress—through sunshine in the day and of cloudy and stormy nights; but

they considering the death of Barny Williams and may be of his brothers and sisters, taking from Williams' widow the property left by him, thought it was best to agree to make mutual wills and they did so—by going to the attorney's office (Mr. Bowne) and getting him to prepare the wills according to the agreement and then went to the deposit vault and therein deposited the wills. This was a family matter—between husband and wife as to their property, which they had as man and wife accumulated by hard labor in their profession. They did not go around declaring to strangers or even to all friends what the agreement was between them.

Such contracts will and ought to be respected by the Court.

Being a family agreement with respect to the property should be carried out.

Johnson vs. Hubbell, 10 N. J. Eq., 332.

Again in such family agreements, "the Courts have dispensed with evidence of the usual form of execution of such contracts, particularly where the parties dwell together as one family or household."

Underhill on Wills, Sec. 292.

E.

The Court also in its opinion (Rec., p. 122), says that the appellant neither in her answer to the original bill, nor in the cross bill makes any assertion that she paid any part of the purchase money for the Washington property.

It is claimed in the cross bill that said Florence and his wife agreed they should assist each other in their professional engagements, and the profits or income derived from such engagements should be common property of each of them, and the property of the survivor of them, and the profits or income should be invested in real estate and good paying securities, and should become the property of the survivor of them. That Mr. Florence always attended to the business interests of his own, as well as that of his wife—and would receive and take the profits arising from such engagements, and invest the same in real estate and good paying securities. And in her testimony she certainly shows the agreement, and that she gave her husband (Mr. Florence) money to apply towards the Washington property as well as other property.

She is supported in this by Mrs. Narina—and Mr. Vilas shows

she had packages that went in and out of the vaults of the Fifth Avenue Hotel by Mr. Florence, Mrs. Florence and the maid, and of value.

But the Court criticises appellants' testimony—in this we think and believe that what she stated is true. There is nothing in the testimony that she had been spoken to as to what was paid on the property—her husband may have asked for it. A wife's confidence in her husband is of the highest honor to her. Her husband may have told her of the $25,000 gold brick, and her recollection as to Larry Jerome and others being present, when she gave the money to her husband to be applied towards the Washington property may be bad. She is a woman of upwards of sixty-five years. It is hardly to be believed that a woman against whom not a word had ever been said—an actress of at least forty-five years—would lie, swear falsely in her old age.

But the Court, to bear out its criticism of her testimony (Rec. p. 124), in reference to Mrs. Narina going to the office of the Fifth Avenue Hotel to get the money, says, "The proprietor of the hotel said if he had had any idea that there was any such sum of money there he would have been very particular about taking charge of it; though, of course, nobody would think of putting a box with such a sum of money with the hotel office.

We respectfully say that the Court misunderstood, or misread, or did not remember the testimony of Mr. Vilas, one of the proprietors of the Hotel, when the opinion was written.

Mr. Vilas, after testifying as to the dates, &c., from 27th February (inclusive), 1887, to and inclusive December 18, 1887, when Mr. and Mrs. Florence and her maid were at the Hotel, was asked (Rec., p. 115):

Q. Do you know whether during the period which Mr. and Mrs. Florence were guests at the hotel or resident therein that Mrs. Florence kept in the safe at any time any box or other receptacle containing valuables of any kind? A. Well, there were packages that went in and out of our safe at different times both by Mrs. Florence, and Mr. Florence and by the maid.

Q. But what they contained you could not at this time say? A. I have no knowledge of that.

Cross-examination by Mr. Darlington:

Q. Were you informed, Mr. Vilas, that box contained thousands of dollars? A. I don't remember that I was. I took it for granted that it must have some value or they would not put it in our safe.

If the Court can be mistaken in its recollection of the

testimony of Mr. Vilas with the record before it and presumably read by it only a short time before, why may not Mrs. Florence (Coveny) appellant be innocently in error as to who was present when she says she gave the money to her husband (Mr. Florence) to be applied on the Washington property. She certainly knew John McCullough, the great actor, she knew Larry Jerome, another great actor and theatre manager, and she knew Mr. Herscher, contemporaries of her husband "Billy Florence" and of herself. Certainly she did not swear falsely as to those gentlemen being present, she might have been mistaken and nothing more.

Let us look at her testimony cross-examination (Rec., p. 77), she said:

"Yes that was the same $7,000 or $7,500 that I got out of the box that Narina brought from the clerks' office (in Fifth Avenue Hotel) for payment on the Washington property Larry Jerome, John McCullough and John Herscher were present, they were in the room and saw it, then Mr. Florence wrote a dispatch in answer to a dispatch that he had received from John Ennis, who was in Washington, &c.," she says that Mr. McCollough was a shakespearian actor and Mr. Herscher a clubman.

Mr. Herscher was called by appellees. He said that he knew Mr. and Mrs. Florence and thereupon appellees' counsel ask Mr. Herscher the following question:

Q. It is claimed, Mr. Herscher, that about the month of April, 1887, you, Larry Jerome, the late John McCullough and a Mr. Connor, the proprietor of a hotel here, were in the rooms of Mr. Florence and his wife at the Fifth avenue hotel, that Mr. Florence brought into the room a telegram from Washington stating that he must immediately send some money there or he would lose what he had paid on some property; and thereupon Mrs. Florence sent for a box which she had in the office of the hotel and took out of that box some $5,000 or $6,000 and gave it to her husband to save the property—in your presence and that you saw it? Please state what you know about that transaction or any transaction of that sort, if you know anything?

Objected to as irrelevant, incompetent and immaterial and also as to the form of the question.

A. Such a thing never occurred in my presence.

On cross-examination he said (Rec. pp. 83, 84):

he testified of seeing Mrs. Florence occasionally at the hotel, but had seen Mr. Florence very often. Mrs. Florence was there when he visited at times, but not always. He was there sometimes on an average of three times a week. Probably would not see Mrs. Florence more than once a month. Could not tell how often he visited there in 1887. He could not say he visited on an average of three or four times a week. Was there frequently about that period. Never was there when talk about some money matters occurred. Does not recollect it. Does not recollect a conversation between Mr. and Mrs. Florence when those gentlemen were there and he walked over to the window to smoke a cigar. No, sir, this affair conld not have occurred while in the room without my noticing it, because I knew Mr. Jerome, Capt. Connor and McCullough, and we never met in his rooms together. Met Mr. Connor there.

Q. At the time you and Mr. Connor met there might not this question as to money matters have been talked over between Mr. and Mrs. Florence and you stepped to one side?

A. Not that I can recollect in any way.

Q. You may have been though?

A. We might have been of course.

Q. Have you no recollection of meeting McCullough there?

A. Never.

Q. Were you there in the evening?

A. I may have been.

Q. Did you meet anybody there?

A. Not to my recollection.

Q. You would not swear that you did not meet somebody there at those times that you went?

A. Well, I would almost be inclined to swear; I could not swear no.

Q. You might have met people there—you might have met those gentlemen who have been referred to?

A. I might but I have no recollection.

Q. It is a good many years ago?

A. It is indeed.

Q. You had no interest in keeping track of any of the affairs of Mr. and Mrs. Florence?

A. Not in the slightest.

Redirect, witness said (Rec., p. 84): Well, in those days he did not smoke. It is only in the last two years I have taken up the smoking of cigarettes.

Recross, witness said (Rec., p. 83): That is possible the other gentlemen he met there might have smoked and it was quite possible that he might have gone out with them when they were smoking.

We here have submitted appellant's testimony with that of Mr. Herscher. Does he contradict her as to the material part of her testimony? No. She did not say Mr. Connor was present with McCullough, Jerome and Herscher. Mr. Herscher says that McCullough, Jerome and Connor were not with him.

Again he says he might have met those gentlemen, who have been referred to there; and that although he did not smoke, yet the others might have smoked and he had no interest to keep track of the affairs of Mr. and Mrs. Florence. It is a good many years ago, hence we repeat, Mr. Herscher does not show that on this question who was or was not present or that Mrs. Coveney (Florence) has sworn falsely.

F.

The Court also in its opinion criticise the evidence of Mrs. Narina.

We respectfully submit that the criticism of the testimony of Mrs. Narina is not fair. She she said she knew Elliott. She did not remember when she saw him last. She could not tell near the time she saw him. She could not remember if it had been two weeks. She never talked with him about this case. She did not tell him she was a witness in this case. She did not say anything to him about taking a trip to Europe. She did not remember that he was at her house the last week in March. That it was all new to her about telling him she to meet Mrs. Florence at her lawyers. She did not tell him she was to meet Mrs. Florence at her lawyers. She was not down to the (lawyers') office two weeks ago. She did not come. That she was not notified to come down here a couple of weeks ago, but was notified to go to madame (appellant's) house two weeks ago. She had not to come here and did not come. That she did not know how Mr. Elliott knew about it, he might have met her husband.

She did not tell Mr. Elliott at her house the latter part of March, this year (1899) that Mrs. Florence told her (Narina) if she gained her suit that she would give her (Narina) $500. That she did not tell him anything of that sort, but she did tell her husband that, and she told her husband she would like to take a trip to Europe, and she also said she did not know how Mr. Elliott knew that.

The appellees called Mr. Elliott as a witness. He testified he knew Mr. Florence and was with him sometime as acting manager and treasurer. That he knew Mrs. Narina, maid to Mrs. Coveny. He had an interview with her at her

house latter part of March or first part of April of last year. That she told him about being a witness in this case for Mrs. Coveny. He had an interview with her at her house latter part of March or first part of April, of last year. That she told him about being a witness in this case for Mrs. Coveny. She said that Mrs. Florence sent for her; that he asked her when she saw Mrs. Florence, and she said not for a long while, but she said, "She sent for me and said she was going to have a law suit," and I said, 'What about?' and she said, "About some property in Washington," and Mrs. Florence wanted to pay her for it; and she said she did not want pay, but for her to pay her visit to Europe." She said Mrs. Florence offered to pay her $500, but she did not want that if she paid her fare to Europe that was all, and she told me she told Mrs. Florence that."

We repectfully submit that Mrs. Narina is not contradicted by Mr. Elliott, even if his testimony be admissible as to matters brought out on cross-examination of Mrs. Narina.

1st. The questions propounded to Mrs. Narina on cross-examination related to offers by Mrs. Florence to her were all relative to things occurring within two week, whereas, Mr. Elliott testified that he had seen Mrs. Narina in the latter part of March or first part of April of last year (1898)

Then he is asked:

Q. Please state whether or not she said anything about being asked to be a witness in this case for Mrs. Coveny, and what did she say in that regard?

The question was objected to.
(See Rec., p. 90)

A. She said that Mrs. Florence sent for her. I asked her when she saw Mrs. Florence, and she said not for a long while, but she said "she sent for me and said she was going to have a law suit," and I said, "whatabout," and she said, "about some property in Washington," and Mrs. Florence promised to pay her for it and she said she did not want any pay, but for her to pay her visit to Europe.

To what time was Mr. Elliot referring, as to the conversation (if any) with Mrs. Narina, from his testimony, because he says Mrs. Narina told him that Mrs. Florence said she was going to have a law suit about some Washington property. On examination of the original bill, it will appear the suit as to the property was filed 14th February, 1895, and the cross bill of appellant claiming the property was filed 3d February 1896.

Then again Mrs. Narina testifies positively she did not tell Mr. Elliott that she was to be a witness, and that Mrs. Flor-

ence offered her money, and all she wanted was a trip to Europe, but she did tell her husband that, when the cross-examination of Mrs. Narina does not show that she was asked any question in regard to it. Let that be as it may, Mrs. Narina is supported by Mr. Vilas.

We again submit she is not contradicted so as to make her unworthy of belief, and there is no evidence that she was bribed.

G.

Again the Court below in its opinion said: "A good deal is said about (Rec., p. 125) about Mr. Ennis to support the present claim of Mrs. Coveney. But Mr. Ennis lived until November 1896. This bill was filed in February 1895. Mr. Ennis being one of the Counsel and signing it as such. The answer of Mrs. Coveney was filed February 3, 1896, and on the same day the Cross-bill was filed. Mr. Ennis was still living and was one of the counsel, in June, 1896, when the defendant's filed their answer denying any particular of Mrs. Coveney's Cross-bill from beginning to the end. What would be his position in the present aspect of the case if he were living? Can it be assumed that he would have been instrumental in voluntary joining with the heirs-at-law in bringing this suit to filch the widow out of her property, if he had really done what Mrs. Coveney swears he did and said about the purchase."

We must beg to differ with the Chancellor.

The record shows,

1st. That the Cross-bill was filed on the 3d February, 1896.

2d. That a demurrer to Cross-bill was filed to it on the 27th day of January, 1897, signed by James Francis Smith, Esq., as solicitor.

3d. The demurrer was overruled on the 24th day of September, 1897, with leave to answer.

4th. That the answer of the defendants (appellees) to the cross bill was filed 9th December, 1897. No solicitor signed it.

5th. Mr. Ennis and Mr. Henkle died nearly two years before filing of answer to cross bill.

6th. There was and is no charge that Mr. Ennis attempted to filch the widow out of her property. Mr. Ennis was not attorney in the matter of the agreement between her and her

husband. Mr. Bowne, of New York was attorney. Mr. Florence may not have told Mr. Ennis of the agreement; he was not under any obligation to tell him. Mr. Ennis was merely the attorney to settle the matter of purchase of the Washington property. The cross bill was filed February 3, 1897. No demurrer or other pleading filed before 24th September, 1897, seven months after cross bill, ample time for Mr. Ennis to have filed demurrer or answer if he deemed it advisable, but he did not.

H.

Again the Court in its opinion indicates there is no testimony as to the agreement between Mr. Florence and his wife, appellant. We again most respectfully differ with the Court.

Mrs. Coveny (Florence) testified that she and her husband were to share alike—they were joint partners in the business. He never bought any property or real estate without consulting her. There was an agreement or arrangement between her (Rec., p. 66) and her husband in regard to the earnings of herself and her husband as actor and actress, and that in case he should invest money, it should be jointly invested—in their conversation it was said that whatever was invested they should share jointly. They had a conversation about Barny Williams' death, and she said it would be well to make our wills, and he said that they should do it, and she said, "and you will leave me everything and I you everything," and they then went (Rec., p. 67) to Mr. Bowne's office, and the mutual wills were prepared by Mr. Bowne and were duly executed.

The Court says that agreement between her and her husband as to the earnings has nothing to do with the agreements as to mutual wills—that may be when taken alone—but when followed by talking of the death of Barny Williams and making of the mutual wills—shows the minds of the two persons.

Again the Court (Rec., p. 132) said appellant was asked before going to the lawyer's office if she and Florence had any conversation in regard to making their wills, she replied: "That in case of his death he was to leave me everything, in case of my death I was to leave him everything. We had a conversation about Barny William's death and I said it would be well to make out wills and he said we should do it. I said "and you will leave me everything, and I will leave you everything" and the Court in commenting on this

said: "She does not state any reply was made by him to this suggestion on her part; and the entire statement seems to stop far short of the mutual agreement required to be proved in such cases," etc.

It is true it appears by the testimony Mr. Florence did not answer her verbally when she said to him: "I said you will leave me everything and I will leave you everything." Yet we do contend he did answer her and consent to her offer of leaving everything to her and she to leave everything to him because it is shown that they immediately went to Mr. Bowne, the lawyer, and executed the wills and placed same in the safe deposit box and they returned to their hotel and saw there Mrs. Josephine Florence Sisson, when Mr. Florence said to her (Rec., p. 59): "Hello. We have both been downtown and made our wills. I have left everything I own to mamma." And then her mother, Mrs. Florence, made answer and said, "Yes, when I die I have left everything to your papa." This was in May. Again, Mrs. Narina testified she remembered a conversation (Rec., p. 62) between Mr. and Mrs. Florence in regard to wills. He always said to her (Mrs. Florence), "Don't worry; it will always be well with you." The day he went to make a will, when he came back he said that everything had been fixed and arranged. Again she testified he (Florence) said: "Well, it will be well for you. I don't think I shall live to be very old. You have helped to earn this money with me."

Again Mrs. Narina testified (Rec., p. 63) that she heard Mr. and Mrs. Florence say, a great many years ago, whichever (of them) should die first should leave it to the other. He said: Don't worry, for it shall be all right."

On cross-examination she said the conversation about making wills was in 1876, in May. Again, Mrs. Sisson testified (Rec., p. 60) that when Mr. Florence was not well he sent for her and said to her: "These rooms—these rooms." I said: "Why do you talk like that." He said: "I feel badly, but if any thing happens to me, Joe—your mother will have every thing and be well provided for."

All the witnesses to the wills prove that Mr. and Mrs. Florence requested them to witness the two wills, each being same date and placed in the safe deposit box.

When we consider that Mr. Florence gave to her—the list Exhibit A. T. C., No. 3 which says (Rec. p. 19): "This is a list of securities I give to my wife." This list contains the very property in question and evidently shows with the testimony there was a contract or agreement between Mr. Florence and Mrs. Florence to make wills to leave to each other

the real and personal estate they then had and should after acquire and did make such mutual wills.

I.

Again the Court in its opinion as to said list of securities and assets. Exhibit A. T. C. Exhibit No. 3 (Rec. p. 130), says it is "a list furnished Florence by the clerks in the Safe Deposit Company, in which he kept a box giving a list of its contents."

We respectfully submit there was no evidence that the list was furnished by the clerk or clerks of that company or any other company. Even if it was furnished by them it is signed by Mr. Florence and became his paper and his act and deed just as much as a will would be his will when executed by him or any deed or contract executed by him.

Upon the facts and law applicable to the case, we submit:

1st. That the Court erred as to the evidence of appellant.

2d. Court erred in dismissing appellant's cross bill.

3d. The Court erred in dismissing said cross bill with costs in favor of appellees.

4th. The Court erred in granting the relief prayed in the original bill of complaint by decreeing a sale of said real estate for the purpose of partition or division among the parties in interest as prayed in said original bill.

5th. The Court erred in not granting a decree in favor of appellant as prayed in her cross bill.

Therefore we submit that the decree of the Court should be reversed, with costs, with directions to that Court to dismiss said original bill and grant to appellant the relief prayed in her cross bill.

Joseph Fitzpatrick

WILLIAM J. MILLER,
Solicitor for Appellant.